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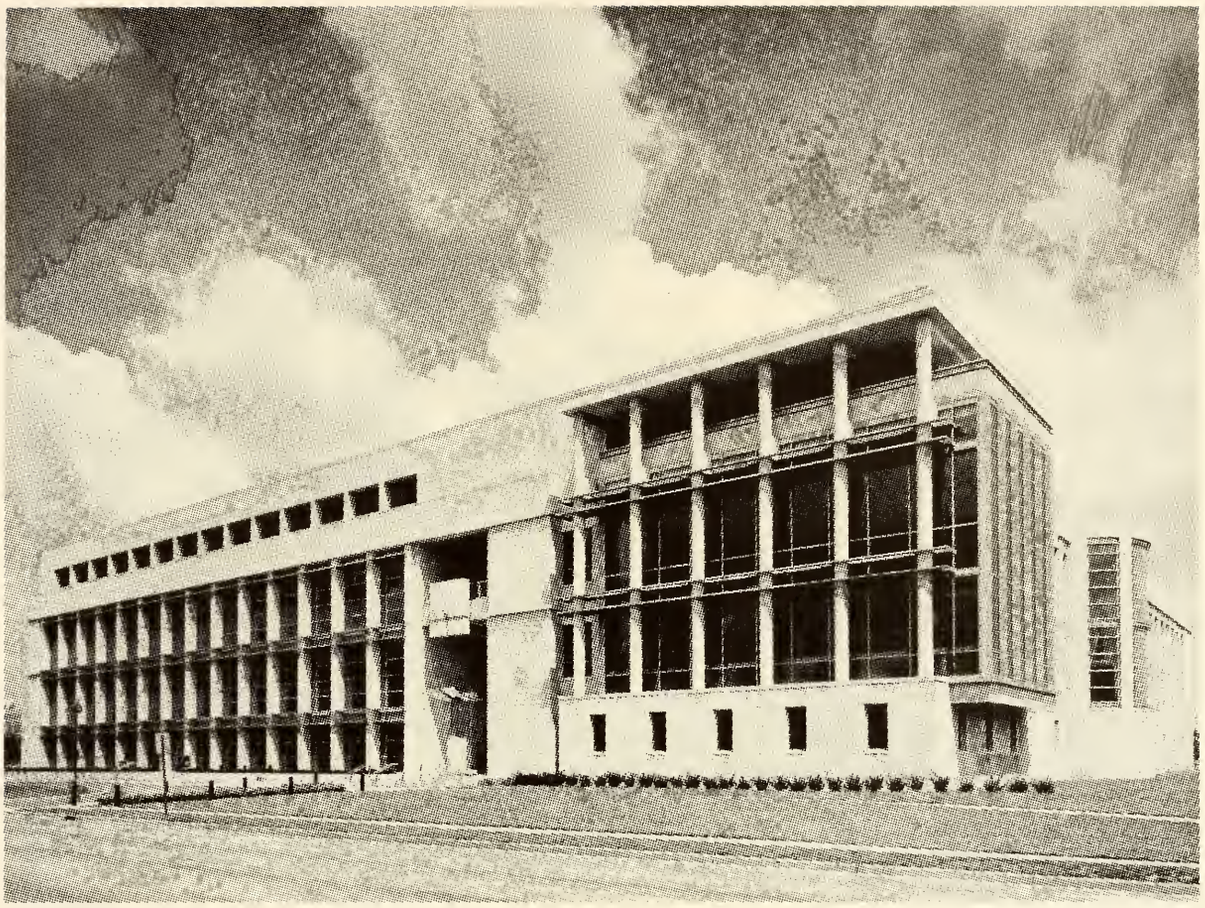

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The *Review* is published twice annually, with a periodic third issue devoted to a specific topic in international or comparative law. In 1994, in conjunction with the Italian Academy for Advanced Studies in America at Columbia University, the *Review* published a special issue on the political and social aspects of Italian law. In 1996, the *Review* published an issue addressing various aspects of Chinese law.

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Indiana Law Review Symposium

The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation

April 3-4, 2008

The *Indiana Law Review* is pleased to host a Symposium in celebration of the 40th anniversary of the passage of the Federal Fair Housing Act. The event will commence with a keynote address on the evening of April 3, 2008, by Theodore M. Shaw, Esq., Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc. A reception will follow the keynote address. The *Indiana Law Review* anticipates that free tickets will be required to attend the keynote address.

The Symposium will be held on April 4, 2008, at the Indiana University School of Law - Indianapolis in the John and Barbara Wynne Courtroom. This date marks the passage of four decades since the tragic assassination of Dr. Martin Luther King, Jr. Dr. King's inspiring message of equal opportunity for every person and his commitment to changing views and attitudes are embodied in the Fair Housing Act. The Symposium will pay a special tribute to Dr. King and will honor his legacy through collaborative efforts to continue the eradication of housing discrimination and segregation.

CLE Certification (Pending Approval)

The *Indiana Law Review* is currently seeking CLE certification for this event and will post registration information for the Symposium as soon as it is available at http://www.indylaw.indiana.edu/ilr/symposium.htm.

The *Indiana Law Review* is honored to host this Symposium event and to publish a Symposium issue dedicated to a topic of such vital importance. For additional information regarding this event, including a list of guest speakers, please visit the Symposium website at http://www.indylaw.indiana.edu/ilr/symposium.htm or contact Elizabeth Ellis, Symposium Editor, at ilrevent@iupui.edu.

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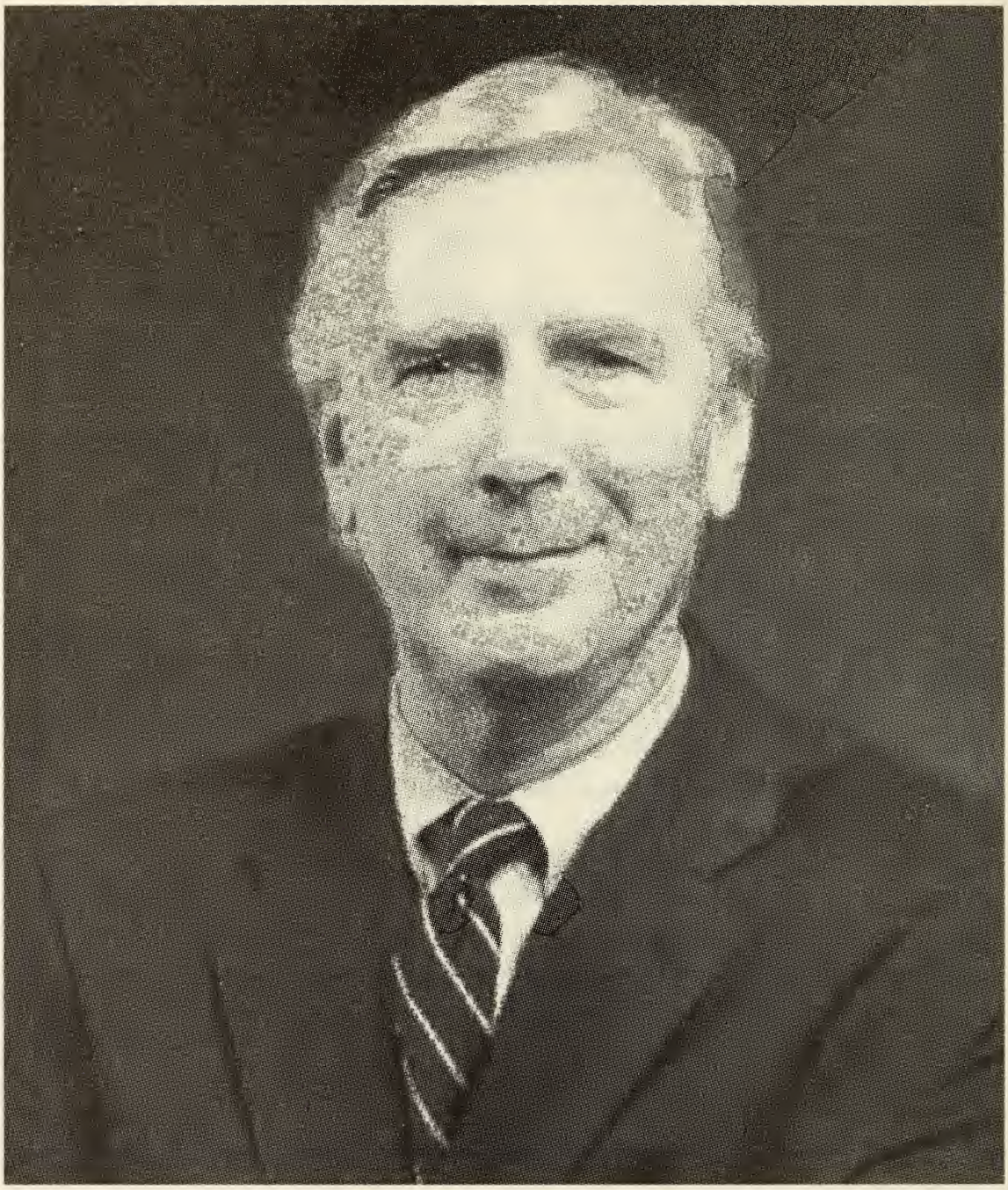

JEFFREY W. GROVE

Indiana Law Review

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TRIBUTES

JEFFREY W. GROVE TRIBUTE

GERALD L. BEPKO*

The Indiana University School of Law—Indianapolis began as an independent private school of law in 1894 and served in that mode fifty years, mostly under the name Indiana Law School. As planning began for the aftermath of World War II, it seemed clear that returning veterans would increase law school enrollments, particularly in population centers such as Indianapolis. To accommodate these anticipated enrollments, Indiana University absorbed the Indiana Law School in 1944 and proceeded to operate it as the part-time program of the Indiana University School of Law based in Bloomington. Twenty-five years later, in the early stages of another nationwide increase in law school enrollments, Indiana University created a separate Indiana University School of Law at Indianapolis and in 1970 opened a new home for the School at 735 West New York Street on the IUPUI campus.

The years following the completion of the 1970 building were very important in the history of the School, not only because of the new organizational arrangements and increases in student enrollments, but also because of the expansion of the faculty. Many new faculty were recruited in those years from 1970 to 1972. Six of those faculty—Tom Allington, Ed Archer, Paul Galanti, Jeff Grove, Ken Stroud, and Jim Torke—stayed the entire length of their careers until retirement. These faculty members formed a nucleus of stalwarts who served in various ways to lead the School and define the School's culture. While I joined the faculty in 1972, I don't count myself among these special colleagues who served so long and with such constancy to build the School because I left the School for seventeen years to serve in the University's administration.

This "expansion cohort" of faculty served the School an average of thirty-four years and in totality have served more than 200 years. All have led projects of various kinds as well as key committees such as Student Affairs, Curriculum, and Appointments. Three of the six have served as Associate Deans for a total of twenty-six years in that role. One of this group, Jeff Grove, served eleven years as Associate Dean and eighteen months as Acting Dean, not only making a major contribution to the growth and development of the School, but also making an important impact on my life which I am pleased to have the opportunity to explain.

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* Former Interim President of Indiana University; IUPUI Chancellor Emeritus, Indiana University Trustees Professor and Professor Law; former Dean of the Indiana University School of Law—Indianapolis.

Jeff began as a faculty member in 1971, fresh from a clerkship in the chambers of Judge Ruggero Aldisert of the U.S. Court of Appeals for the Third Circuit. Before clerking he studied law with a Legal Research Fellowship and a Trustees Scholarship at George Washington University where he graduated with honors. He was the Notes Editor of the *George Washington Law Review* and won the School's Outstanding Law Review Note Award.

Upon his arrival at our Law School, Jeff was quickly embraced and became a prominent member of the new faculty. From the very start he was a fine classroom teacher, simultaneously friendly with students, but demanding; thoughtful, but skillful with his use of subtle humor. Students identified with him in many ways and flocked to his classes in subjects that don't ordinarily attract large enrollments.

It's not surprising that Jeff was a good teacher from his earliest days on the faculty because he had some teaching experience and an excellent mentor even before he arrived in Indiana. While a clerk he helped Judge Aldisert teach a course on Federal Jurisdiction at the University of Pittsburgh School of Law. Jeff continued to teach Federal Jurisdiction throughout his career and also continued his association with the University of Pittsburgh through his now twenty-year membership on their School of Law Board of Visitors.

As a new member of our Law School faculty he not only performed well professionally, but he stood out for another reason. The Law School was a pretty conservative place in those days, at least in terms of the appearance and habits of faculty. In part because of its location near the courts and law firms, the School's senior faculty looked a little like law firm partners. They wore white shirts, suits or sports jackets, and ties. Many senior faculty came to their offices, in ever so slightly more casual clothes, on Saturday mornings—a pattern observed in many law firms of that era. In contrast, Jeff brought with him an upscale version of the sartorial and coiffure trends of the 1960s. Some senior faculty viewed him as something of an alien cultural icon of the turbulent 1960s, but because of his sophistication and portfolio of talents, he was readily accepted and actually contributed to a healthy evolution of School customs. Students also noticed his appearance and demeanor. Starting with a group of African American students he accompanied to a conference in Michigan, his underground name among students, coined with considerable affection, was "Cool Breeze."

Among his faculty colleagues he also was an athlete of some standing, at least with respect to the three annual touch football games played between the students and the faculty in the 1970s. Somewhere there is an eight millimeter film taken by a student of Jeff's spectacular catch of a long pass which produced the winning touchdown in that year's faculty-student game. It was such a memorable gridiron moment that it has since been referred to as simply "The Catch."

A decade after Jeff arrived, and a year or two after Jeff had been promoted to full professor with tenure, a series of unanticipated events changed both of our lives. In March 1981, toward the end of the academic year, Dean Tom Read, for whom I served as Associate Dean for Academic Affairs, was lured away to be the Dean at the University of Florida Levin College of Law. Indiana University leaders concluded that the 1981-82 academic year would be devoted to a search for Tom's successor, and I accepted the role of Acting Dean. One of my first

thoughts was that we needed someone from the faculty to serve as Associate Dean for Academic Affairs. After consultation with faculty colleagues, I decided to ask Jeff if he would be willing to serve. He had many positive leadership qualities; he was well liked and highly regarded by our faculty colleagues; he understood quality in academic programs; and he had timely experience as a visiting professor at another law school, giving him an important perspective that derives from working in different faculty contexts.

In 1979-80 he spent a year as a visiting professor at the University of Idaho College of Law. Nearly a decade later, after seven years in the Dean's offices, Jeff returned there for the spring term in 1988. Not long thereafter, in 1990, Jeff followed a few other members of the Law School faculty in serving as a visiting professor at the University of Illinois College of Law in Urbana-Champaign.

Jeff graciously agreed to serve as Acting Associate Dean, and this began a period of five years during which Jeff and I worked very closely together for a year in an acting capacity and four years as Associate Dean and Dean. We were joined in the administration by our dear departed colleague Associate Dean G. Kent Frandsen, who was responsible for student affairs. We often worked as a trio, and there was a special sense of teamwork among us.

Because Jeff's area of responsibility was Academic Affairs—where both of our attentions were concentrated—Jeff and I worked especially closely together to cover all the many responsibilities of an ambitious law program. One such responsibility was the sabbatical ABA/AALS accreditation visit in 1981 through which we thought we should make a special effort to show our enthusiasm for the process. Because the School's administration was serving in an "acting" capacity, and because a member of our faculty was the leader of the ABA accreditation office, we wanted to make the most compelling case to show how aggressively the School was pursuing a strong academic vision as well as full compliance with ABA/AALS standards. Because we had a tiny staff, Kent Frandsen, Jeff, and I threw ourselves into this work and tried to be everywhere and do everything to help the visitors understand our growing program quality. The late Steve Frankino, then Dean of the Catholic University of America Columbus School of Law and the chair of the ABA/AALS Visitation Team, noticed this and several times remarked in a playful way about the energy of the people in the Dean's office. In one of our meetings, he described Jeff and me as the "Dynamic Duo," referring to how many places and causes in which we personally interjected ourselves. Dean Frankino allowed, however, that he wasn't sure who was Batman. He suspected that Jeff, as the younger of us, was Robin, but this meant that Batman was the shorter of the duo, in conflict with the lore of Gotham.

Jeff was especially capable in the role of Associate Dean for Academic Affairs and handled most of the issues so smoothly that these years comprised a quiescent, productive period. Faculty were hard at work teaching and making an impact in their fields at least in part because Jeff was good at providing just the right encouragement, helping colleagues to envision their futures, to develop plans to increase their impact, and to move to higher levels of achievement.

In 1985-86 Indiana University Vice President Glenn W. Irwin, M.D., head of Indiana University's Indianapolis campus (IUPUI), announced his retirement.

In the summer of 1986 I became his successor (later assuming the additional title of Chancellor). One of my first tasks as Vice President/Chancellor Designate, even before I had formally moved to my new office, was to discuss with faculty and then see to the appointment of an Acting Dean at the Law School. Jeff was the obvious choice. Jeff had been an excellent Associate Dean and had the confidence of the faculty, an indispensable ingredient in an Acting Deanship. Another reason was the work he had done in ABA/AALS accreditation visits.

As I mentioned earlier the person who led the ABA office for accreditation was a member of the faculty. This is Dean James P. White, another long-serving member of the School's faculty whose initial appointment preceded the 1970 expansion. For nearly thirty years he was the Consultant on Legal Education for the American Bar Association and was responsible for the ABA/AALS accreditation process. Thus it was not unusual for members of the faculty to be tapped for slots on Visitation Teams. This experience gave faculty members important insights about legal education that was good preparation for dean's work.

Jeff was a member of the Visitation Teams for the University of Washington School of Law in 1982 and Arizona State University College of Law in 1985, providing good background for his 1986 assumption of the Acting Dean's role. Jeff has kept up his work in this arena, later serving on the 1989 visitation of the University of Florida Levin College of Law and chairing the 1991 team for the City University of New York Law School at Queens College. Finally, he was a member of the ABA Team that visited the Temple University Beasley School of Law Masters of Law (LL.M.) program at the China University of Political Science and Law in Beijing in 2000.

In partnership with Jim Torke, another outstanding expansion cohort colleague who served as Acting Associate Dean (and I'm told was explicitly assigned to the role of Robin), Jeff served for eighteen months as Acting Dean in superb fashion. The most accurate comment I saw about how well Jeff served came from an alumna who served as a professor at a well-known private university as well as a judge in the state courts of Indiana. In writing to Jeff she said:

> What I truly congratulate you for is that you not only "held your own" in the position as dean, you really did leave your own mark by your special brand of good humor, grace, and competence. I know you're looking forward to returning full time to the classroom—where your talents are legend—but I hope you will look back on your administrative activities with well-deserved pride and satisfaction.

As a natural leader of the faculty and as someone with experience in deaning, Jeff could have served well as a permanent dean, here in Indianapolis or elsewhere, but from the very beginning he made it clear that he had other plans for his future. At the top of his list was to explore international and comparative law and to extend the reach of the Law School to China.

His interest in China began when we were invited by Columbia University School of Law Professor R. Randle Edwards, in his role as Chair of the Committee for Legal Education Exchanges with China, to host a Chinese

Professor for the 1984-85 academic year. We agreed with enthusiasm and Professor Wang Qun of the East China School of Political Science and Law in Shanghai arrived in the fall term 1984. This visit launched Jeff's, and our Law School's, long and productive relationships in China.

As Jeff was nearing the end of his term as Acting Dean, shortly after the commencement ceremony in 1987, he wrote a Dean's message in the School's Alumni publication which said:

> As I write this message, I am prepared to embark upon a journey to the People's Republic of China to inaugurate the Law School's China summer program at the East China Institute of Politics and Law in Shanghai. . . . [This] is our first foreign law offering. It reflects our school's continuing interest in providing a broadly gauged and innovative instructional program.

That statement was prophetic. The School's international activities have grown exponentially so that now there are many opportunities for American law students to study in programs in other parts of the world, especially China, and there are many programs at the School which attract international students. These latter programs began with an LL.M. degree in American Law for Foreign Lawyers, but there are now four additional LL.M. tracks and a program that leads to the degree of Doctor of Juridical Science (SJD). Nearly all these international activities and the School's impressive array of graduate degrees, attracting both international and domestic students, have been spawned by Jeff in his six years as Associate Dean for Graduate Studies (2001-2007) and his overlapping fifteen years of service as the Director of the School's China summer program (1990-2005).

In the course of being the leader of this internationalizing of the School, Jeff has spent much time overseas and has been a frequent lecturer in China. Since 1998, he has carried the title of honorary Professor of Law at the Renmin (People's) University of China School of Law in Beijing. Back home he serves as Chair of the Board of Faculty Advisors of the Indiana International and Comparative Law Review, as a Board member of the School's Center for International and Comparative Law—a Center that has attracted very accomplished new faculty to build on the foundation Jeff created, and as a Senior Associate of the Indiana University Research Center for Chinese Politics and Business—a new center directed by a faculty member in the nationally acclaimed East Asian studies program in Bloomington, which will combine faculty from various disciplines in Bloomington and Indianapolis.

When I returned to Inlow Hall to occupy an office as a retiree from the University Administration, the thing that was most striking to me, even more than the School's new building, was the international flavor that now pervades the School. International students are numerous, and there is evidence of their presence everywhere, in classrooms, in the lounges, on bulletin boards, in the curriculum, and in the School's notable achievements. One of the first persons I met when I arrived back at the School was European law scholar Frank Emmert, the Director of the Center for International and Comparative Law, whose presence is an important symbol of the School's commitments and achievements in these important fields.

Jeff Grove has led this part of the School's growth in the third season of his career. In the first season, during the 1970s, he was a young teacher of great promise who was given nicknames by the students. In the 1980s, in the second season, he was a dean and provided leadership for the management of the School. From 1990 until this year, he has used the experience of the first two seasons to encourage a new and important feature of the School and our University.

In retirement I am proud to be back at the Law School, which is now immeasurably stronger than when I left and is led today in promising fashion by our excellent new Dean, Gary Roberts. I am proud to use an office and teach a course amongst the friends who have led the School and the superb newer faculty so many of whom were recruited during Norm Lefstein's stellar deanship. I am proud to be back just in time to join in recognizing as they retire the wonderful work of dear friends in the 1970-72 expansion cohort. I am especially proud to see up close the product of Jeff Grove's third season as a leader within our School.

When I left the School for the University Administration in 1986, I wrote a handwritten note to Jeff which said, "I've never worked as closely with anyone, appreciated a colleague more, or had a better friend than you have been these past five years. I will miss our 'team' very much and hope that we can recreate it again at some point for some new task." Twenty-one years later, it has been an especially satisfying experience to look at Jeff's third season of contributions to the School, to be reminded of the sentiments reflected in that handwritten note, and to write this Tribute to him as he joins Tom Allington as the last of the expansion cohort to retire.

TRIBUTE TO JEFF GROVE

JAMES W. TORKE*

I take up this task with a mixture of eagerness and frustration. I am eager because I have known the subject long and well and know there is much about him to praise. I am frustrated, however, for I have been allotted only 1000 to 1500 words to do it in, and I have already used up sixty-some words.

Jeff Grove and I came to the School of Law at the same time: August 1971. We were two parts of a six-person faculty expansion necessary to meet the burgeoning student numbers attracted by the new full-time program which, together with the evening division students, pushed enrollments to over 1000 students. Jeff arrived fresh from a two-year clerkship with the outstanding Third Circuit U.S. Court of Appeals Jurist Ruggero Aldisert.

A native of Altoona, Pennsylvania, Jeff graduated from Juniata College in Huntingdon, Pennsylvania, and then matriculated at George Washington University Law School. After a year of law school, Jeff determined to gain some broader perspective before returning to his legal studies. He took up the challenge of teaching history and government courses to junior high students in the Washington, D.C. schools. He then returned to the Law School, graduating with honors in 1969. As a student, Jeff early distinguished himself as a writer and scholar. His case note on the important Establishment Clause case of *Board of Education v. Allen*,[1] was selected as the outstanding student case note of Volume 36 of the *George Washington Law Review*.[2] As a member of the Law Review, he also wrote an extended commentary on the peculiar difficulty of standing issues that arise under the Establishment Clause.[3] His extended comment examines those standing problems as they arose in the lower courts in a then pivotal case ultimately resolved in the Supreme Court under the name *Flast v. Cohen*.[4] He was also elected to the editorial board where he served as Notes Editor.

During his third year, Jeff interviewed with a variety of big city law firms, and several of them, such as Latham & Watkins, were willing to hold open their offers until he completed his clerkship with Judge Aldisert. As his second year with the judge came to an end, his plans to enter practice were somewhat abruptly superseded through a call from his former professor (soon to be Dean) Jerry Barron. Professor Barron told him of a faculty opening at Indiana University School of Law in Indianapolis. A trip to Indianapolis convinced Jeff that an academic career was worth a try. His intuition proved true and proved to

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1. 228 N.E.2d 791 (N.Y. 1967).

2. Jeffrey W. Grove, Recent Decision, *Textbook Lending Statute Benefits All School Children and Does Not Aid or Establish Religion*—Board of Education v. Allen, 36 GEO. WASH. L. REV. 246 (1967).

3. Jeffrey W. Grove, Editorial Note, *The Insular Status of the Religion Clauses: The Dilemma of Standing*, 36 GEO. WASH. L. REV. 648 (1968).

4. 392 U. S. 93 (1968); Grove, *supra* note 3.

be a great good fortune for the thousands of students he has taught, as well as for the dozens of colleagues among whom he worked for the next thirty-six years. Indeed, few others have left such a positive and distinctive mark on the nature of legal education in Indianapolis as Jeff Grove.

In those days, rookie faculty members were assigned to teach what had to be taught. A few years of utility service usually preceded the point where one could settle into one's preferred area. As a scholar and teacher, Jeff has become a proceduralist, a teacher of "lawyers' courses," the central importance of which only lawyers can appreciate and only a few come to love. In keeping with his procedural emphasis, his first principal article as a faculty member was an incisive study of the intricacies of Indiana's Trial Rule 59, the peculiar complexity and twisting history under which Indiana lawyers have labored for decades.[5] His initial teaching package comprised a kind of catch-all course in Urban Legal Problems, a course in which Jeff turned the focus to urban poverty. He also contributed to the clinical program, which at that time was taking shape as a varied cluster of student externships. On top of these responsibilities, he took on the training of the moot court team. In the early 1970s, the major national competition was sponsored by the Association of the City of New York. The best teams survived local and regional competitions and then headed to New York for the final rounds. In his few years as coach, Jeff led a team of talented students all the way to the final round in New York City, thus beginning the tradition of moot court excellence which continues to distinguish the School still today. The one plum—at least it was a plum to him—was the course in Federal Jurisdiction, a course that he has taught throughout his career. As his service continued, Jeff moved into his preferred areas to take on, in addition to his course Federal Jurisdiction, the basic sequence in civil procedure, upper level electives in Conflicts of Law and Complex Litigation, as well as a changing mix of seminars and internships involving the federal court system. He retires as the faculty's acknowledged dean of federal procedural law and judicial system, an area in which he has frequently written and spoken in this country and throughout the world. His stature as an expert proceduralist was well attested by his 1987 election to the American Law Institute ("ALI") where, from 1988 through 1994, he lent his special expertise in complex litigation to the ALI's Complex Litigation Project.

Jeff early earned a reputation as a strong classroom teacher. His classes were regarded by students and colleagues alike as serious-minded, deep, and stimulating. He presided with an appropriate sprinkling of wit and a demanding, but always courteous, mode of inquiry. His elective courses always drew many of the School's most able students. At the same time his deep knowledge, careful preparation, and sure-handed grasp of the subject, which informed his lucid lectures, held the close attention and lasting appreciation of all of his students. Those who have seen Jeff teach—colleagues and students alike—share a firm impression that his teaching was dignified but never pompous, full of wit but

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5. Jeffrey W. Grove, *The Requirement of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977).

never ingratiating, always on point and substantial, neither careless nor rigid, challenging but not intimidating, and always imparted with a natural, understated grace.

Had his work as a scholar and teacher of federal procedural law been his sole legacy, it would have been an ample reason for high tribute. I wrote above, however, that few others have had as distinctive and innovative an influence on the School of Law as Jeff Grove. Through his initiative, the School has gained both an international profile of high regard beyond its walls as well as a cosmopolitan atmosphere within.

To begin, Jeff's talents as a leader, administrator, and diplomat were early in evidence as he took on administrative tasks ordinarily entrusted to the most senior faculty. Fortunately, among those of his colleagues who recognized his rare combination of personal talents was Jerry Bepko, who served as Dean of the School from 1981 through spring of 1986. Jerry asked Jeff to serve as the School's Associate Academic Dean, the Dean's most vital assistant. In those days, the Dean and his two associates, aided by a small staff, did whatever had to be done to run the School and push it forward. Jeff took to this "multi-tasking" with a natural aptitude, tact, and aplomb. So when Jerry Bepko left to become the IUPUI Chancellor, it was natural that the School should turn to Jeff to serve as Acting Dean. With barely a moment's notice, he stepped into a post he had not sought. He served one and one-half years in this post. He kept the ship aright and on a progressing course. Thus, when the next Dean, Norm Lefstein, arrived, he inherited a smooth-running operation with upward momentum, supported by enthusiastic constituencies inside the School and out.

It was during his period of service as Acting Dean that Jeff's interest took the turn that led to his most innovative and distinctive contributions to the School of Law. Through some fortuity or other, it happened that the School was hosting a Chinese Scholar, one Professor Wang Qun of the East China University of Political Science and Law in Shanghai. Jeff befriended Professor Wang and became his principal guide and unofficial host. This friendship sparked the initiative by which Jeff Grove forged the Law School's first foreign study program in Shanghai, China. At the time the program was one of the very first Chinese study programs based in an American law school. So it was a pioneering venture, certainly for our Law School, but also for American legal studies in general.

From 1990 to 2005, Jeff served as Director of the Program. This position took him frequently to China where he quickly became acquainted with the leading Chinese law schools, law scholars, legal officials, and private lawyers. Taiwan was also included in his travels. There he established an ongoing faculty exchange program with National Taiwan University College of Law.

His growing acquaintance with China and the Chinese legal profession led over the next many years to his traveling and lecturing throughout China, where he is held in the highest regard as a representative of the American legal community. He continues today, in the United States, China, and Taiwan, to be in demand to speak on Chinese and American law.

In 1997, through Jeff's efforts, our China Program was shifted to Renmin University of China School of Law in Beijing. Renmin (People's) University is

one of the leading universities and law schools in China. His growing knowledge of the Chinese legal system and its academicians has led to many honors, including his being named in 1998 as Honorary Professor of Law at the Renmin (People's) University School of Law. During this period he also developed a superb textbook for the China Program. His text, *Selected Readings in Chinese Law*, is supplemented by a collection of Chinese primary legal sources and is updated frequently. I speak from some experience here, having served as the Program's on-site supervisor in 2002, during which time I became very familiar with the text. I found it to be a superb introductory canvas of Chinese law.

The China Program opened up the first on-site study of a foreign legal system available to our students—hundreds of whom have benefitted. Many Indiana lawyers, as well as lawyers and students from many other outstanding American law schools, have also participated. It also opened China and its legal culture to a good number of our faculty who were afforded, as was I in 2002, an opportunity to spend many weeks in China while supervising the participating students.

This pioneering China Program served as a seedbed for a host of other foreign study programs that have enabled our students to study law in France, Croatia, Latin America, and, through the International Human Rights Program, in countries throughout the world. It also served as a vital spur to the founding of the School's second law review, the *Indiana International & Comparative Law Review*. Jeff Grove serves as Chair of its Board of Faculty Advisors. This constellation of assets has given rise to the School's Center for International & Comparative Law, on the advisory board of which Jeff Grove plays a critical role.

The spark ignited by Professor Grove in 1986 also led to an invaluable enrichment of our student body. As Indiana University School of Law—Indianapolis became known throughout China and other nations of the world, it began to attract a growing number of foreign students. The greatest number naturally was from the People's Republic, but also included a growing number of students from Korea and other Asian, European, African, and South American nations. Many of these students came to us with foreign law degrees, and as their language skills improved, they added a new fount of depth and breadth to our curriculum. Many of these students earned a J.D. degree that they took back to their native country where, as practicing lawyers and officials, they have put their special familiarity with American law to good use. As well, they have remained loyal alumni. Indeed, an active alumni chapter is now budding in Beijing. Some few chose to stay and practice in the United States and have joined firms from New York to Indianapolis to Los Angeles, often serving as key liaisons for American clients doing business in China as well as for foreign entities doing business in the United States. Thus, our international connections have become two-way bridges.

Beginning in 2001, now in a new role as Associate Dean for Graduate Studies, Jeff set out to develop a Master's degree curriculum for foreign lawyers seeking an abbreviated, one-year, introduction to our legal system. Through Jeff's efforts and planning, we began in 2002 to offer a Master of Laws (LL.M.) in our Program in American Law for Foreign Lawyers. The program continues

to grow and has brought to the Law School as many as fifty or more foreign lawyers each year. As they take a combination of special courses as well as regular curricular offerings, they are sprinkled among our students and faculty adding an inestimable richness to our School.

From this first master's offering there grew several more graduate degree programs, culminating in 2006 with the establishment, again through Jeff Grove's efforts, of a track offering the Doctor of Judicial Science (S.J.D.) degree, the highest degree available in American legal studies, a degree available in only fifteen percent of American law schools.

The effect on the School from foreign studies and foreign students together with our graduate degree programs have been immense and wholly enriching. Certainly it has given the School a genuine international reputation, as certainly it has brought to the School of Law a vastly expanded awareness of the world around us. By far the greatest portion of the credit for these benefits belongs to Jeff Grove; much of his work has involved travel and diplomacy, much of the less pleasant part has involved shepherding the programs through the labyrinthine procedures endemic to any academic organization as large as Indiana University. In the midst of these duties, it was always my pleasure to watch Jeff giving freely of his time to counsel our foreign students who flock to his office for advice, favors, reassurance, and comfort. Jeff has a natural touch with these students, and they respond with an appreciation that reminds me of the sort of gratefulness and honor that is usually reserved for a wise and kindly uncle.

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These tributes to Professor Grove are intended largely as professional tributes. Nevertheless and despite the few words I have been allotted to honor Jeff Grove, I would feel remiss if I didn't add a brief personal note, for he has been not only a valued colleague, but a dear and staunch, wise and understanding friend of mine over the thirty-some years we have served together.

As I wrote earlier, Jeff and I came to the Law School more or less simultaneously in 1971. While from the beginning he seemed to me a good fellow, it took a few months for us to recognize in each other whatever are those qualities that bring people together as friends. Those qualities are many and complex. I could mention his many virtues, not least among them those knightly virtues of courage, generosity, and loyalty, but what brought us together first—and continues to cement our friendship—is a shared sense of humor. The instances of mutual laughter that we have shared over the years are uncountable and remain among my most treasured memories. An aspect of this tie sometimes took the form of mild pranks. I can not begin to recall how often my cleverly disguised telephone calls had Jeff puzzling over the nut on the phone. He, of course, will deny that I ever fooled him. But then, how would he know? Of course, it could be that he has been humoring me. Hard to say.

Beyond the laughter we have shared many other pleasures, problems, disappointments, and successes. For thirty-seven years we grew together into advanced adulthood. I look forward to the many more years yet to come.

TRIBUTE TO JEFFREY W. GROVE

LAWRENCE P. WILKINS*

The wall of an interior corridor in Inlow Hall serves as a gallery of portraits of many of the past deans of the Indiana University School of Law—Indianapolis and its predecessor schools. A visitor to this gallery can gaze upon visages captured in various artistic expressions and impressions of those who have led this School from the "front office" over the span of many decades. Doubtless, a large majority of law schools in this country have a similar gallery. It is a fine tradition, born of warm sentiment for those who have labored at the administrative tiller of the law school over the years. Hanging their portraits on the walls of the building has made them a symbolic physical part of the institution that they have helped to build, and though living memory of them will fade, the institution itself carries the memory of their service forward to future generations. The portraits are nice (or not—depending upon your taste in artistic style or your assessment of the skill of the artist, or both), but they do not tell the stories of the persons portrayed and the true nature and quality of their connections and contributions to the Law School.

This Tribute to Jeff Grove is another expression of a grand old tradition in legal academies—that of memorializing colleagues who have reached the pleasant intersection of a chronological age that qualifies them for retirement and a psychological state that allows them to realize that retiring is a good thing to do. An obvious, but nevertheless important, positive difference between this printed method of memorializing and the portrait-hanging method is that the tribute sets out at least part of the story of the person memorialized.[1]

Others have ably set out the timeline of Jeff Grove's tenure at the School of Law and the significant events in his career, so I will avoid as much repetition as possible, and I will not attempt to chronicle the entire arc of his career. I will, instead, attempt to provide the reader with some small insights into Jeff's contributions to the Law School and to add some final dashes of color to the excellent brushstrokes of the earlier descriptions.

Among those deans whose portraits hang in the gallery are those whose efforts have helped shape and move this Institution of legal education. Some of them focused their efforts upon establishment of place, others directed resources toward establishment of programs, and still others worked hard to establish, maintain, and burnish the School's identity. The third quality, a concept grounded in intangible and intuitive characteristics, rests partially on the first two, but it is more. It delineates the institution in the mind of the person thinking or speaking of it as a unique entity, distinct from every other place where programs of legal education are offered. In this sense identity is related to reputation. Law schools in this day of competitive efforts to attract the best and brightest students

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1. The photographs at the beginning of the tributes give future readers an idea of the tributee's physical appearance.

expend significant effort and resources pressing into the hands of prospective applicants attractive printed brochures adorned with icons of the physical place and glowing descriptions of programs of instruction, experience, and outreach. The forces of this competitive market drive them to vociferously question the value, reliability, and effect of national ranking systems and to devote even more intellectual and real capital aimed always at improving their standing in those rankings. At a deeper level, however, the need for identity in this reputational sense fuels the efforts. We legal educators want to be "known" in the world of education and we want *how* we are known to be a favorable idea in the minds of those who know us.

Identity has a quality that is unrelated to reputation, but no less important to a law school. It has to do with how a law school "feels" to its students, faculty, alumnae, and visitors. In this sense, identity—though it is still related to place and program—seeks to accomplish a sense of separation from "institution." To say that a place has an "institutional feel" is depreciatory. Law schools want to be thought of as welcoming, warm, nurturing, sustaining places that evoke pride of association.

Jeff Grove, in the twenty-seven-plus years that I have known him, has been concerned about, has worked hard for, and has accomplished a great deal in establishing, enhancing, and protecting the identity of this Law School, both in the reputational sense and in the sense of "feel." His efforts have matched all of the deans whose portraits grace the gallery in the Law School and have exceeded many.

For a Law School that has a sibling with a similar name living in the same university system, all senses of "identity" become super-charged with importance, and an increase in expenditure of efforts and resources devoted to establishment and protection of identity follows. As in all sibling relationships, rivalrous feelings and conduct are heightened and focused on the other sibling. The law schools of Indiana University School of Law—Indianapolis and Indiana University School of Law—Bloomington have not only to work to establish, enhance, and protect their identities among other national law schools, but also to keep their similar identities-as-place separate in the minds of those who would contemplate legal education associated with Indiana University in any context.

Sibling rivalries can easily get out of hand, and hyperbolic references in both directions can quickly balloon into hard feelings and rash actions. The siblings sometimes need an intermediary to calm those feelings and head off those actions. Jeff Grove has, on more than one occasion, carried off that function of intermediary in great style and effect. One example involves the LL.M. program, which, as you have read, was established with Jeff's leadership.[2] As would naturally be the case, members of the Indiana University of Law—Bloomington faculty were concerned that establishing a Master of Law Degree program at Indiana University School of Law—Indianapolis might be confused with the graduate program at their law school. State and university officials charged with

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2. *See* Gerald L. Bepko, *Jeffrey W. Grove Tribute*, 41 IND. L. REV. 273 (2008); James W. Torke, *Tribute to Jeff Grove*, 41 IND. L. REV. 279 (2008).

the responsibility of reviewing and approving new educational programs mirrored that concern. Jeff, who had long been concerned about matters of identity and having thought about such issues well in advance, was empathetic about those concerns. Coupling that empathy with the skillful exercise of his well-developed diplomatic talents, Jeff successfully persuaded the decision-makers and the Indiana University School of Law—Bloomington faculty that the identities of the two schools could continue to be maintained separately and that the new LL.M. program at Indiana University School of Law—Indianapolis would bring no harm to the Indiana University School of Law—Bloomington program.

"Branding" is another aspect of identity to which much human effort and resources are expended in many contexts. Those who offer goods and services to a consuming public want those consumers to be able to immediately and confidently identify the goods and services as those of the offeror. Once an offeror has successfully built a good reputation, the offeror uses the brand to keep the thoughts about the offeror fresh in the minds of actual and potential consumers.

Branding efforts have been a major undertaking in the world of higher education in recent years. Indiana University recently undertook a major initiative directed at reviewing, enhancing, and reforming branding policies and practices throughout the system. The reform effort in its early stages, as most do to one degree or another, had a tendency to overreach. One aspect of the reforms was to emphasize the relationship of place in the brands of the nine campuses within the Indiana University system. That produced some unique problems for this Law School, and Jeff was at the forefront, leading the faculty in a diplomatic mission to meet the objectives of the branding initiative while minimizing any harm to the identity of the School of Law.

To bring into high relief the significance of Jeff's efforts in this branding reform initiative, some background is necessary. The roots of this Law School go back to the establishment of the Indiana Law School in 1894. Its association with Indiana University dates to 1944. When the Law School moved from the Mannechor Building downtown to the campus of Indiana University Purdue University Indianapolis (IUPUI) in 1970, issues relating to identity immediately arose.[3] IUPUI itself had barely only been fully constituted in 1969. The Law School certainly was not a *new* law school, but many—thinking at the level of institution-as-place—erroneously supposed that a newly-born "IUPUI law school" had found its place on New York Street. Efforts by the faculty and administration to protect the already well-established identity of the Indiana University School of Law—Indianapolis[4] and to try to foster consistent thinking about the School in terms of identity redoubled and continue to this day. Jeff was

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3. Ronald W. Polston, *History of the Indiana University School of Law—Indianapolis*, 28 IND. L. REV. 161, 167-70 (1995).

4. The actual "official" name of the Law School was a matter of some question during this time. The faculty had voted to adopt the name Indiana University School of Law at Indianapolis. The present iteration of that name, and the name used in this tribute throughout, was officially adopted by the Indiana University Trustees on September 12, 1975. *See id.* at 169 nn.62 & 63.

part of that early effort. When he moved to the administrative side as Associate Dean for Academic Affairs and later as Acting Dean, he placed high on his agenda efforts to sharpen the brand of the Law School and to counteract the clouding effects of the references to "IUPUI law school."

In the recent "branding" initiative the early proposals called for modification of the existing brand of Indiana University School of Law—Indianapolis to one in which the initials "IUPUI" were to be colorfully dominant. The veteran of the identity battles of decades past sprang into immediate and intensive action. The new "IUPUI" brand threatened not only to wipe out the efforts of the 1970s, but to eclipse more than a century of effort and resources that had established the identity of this Law School in the national community of law schools. Jeff was determined that this would not happen. He persuaded the faculty and administration that a formal resolution and active diplomacy within university circles were needed to convey the concerns about identity. He knew that the decisionmakers would have to be convinced that preservation of that identity of the Law School and consistency in the branding policies and practices pertinent to the sibling schools were paramount in any modification of branding within Indiana University. His careful wording of the faculty resolution and his diligent follow-up support in negotiations has successfully produced a workable compromise between the original brand and the proposed one, and has reinforced the principle of consistency in the names of the sibling schools.

Jeff's programmatic accomplishments have also contributed measurably to the identity of the Law School in the sense of institutional "feel." Other tributes have related Jeff's instrumental efforts in establishing the summer China Program and the LL.M. and S.J.D. Degree programs. The Law School community has, for many years, enjoyed the colorful and aesthetically pleasing posters advertising the China summer program to prospective attendees, many of which were produced from Jeff's own on-site photographs. The prominent display in the atrium of international flags representing the nationalities of our LL.M. students, to say nothing of the bits of conversations in other languages that one can overhear in a walk through the corridors of the building, have lent a strong cosmopolitan feel to the School that was non-existent until Jeff's efforts in the global realm began to bear fruit. His appointment as Associate Dean for Graduate Studies allowed him to focus his efforts, marshal resources, and engage in extensive outreach to launch that program. That has led to another of the "nicknames" that Jeff has carried through the years. "Dean Grove" has been an able and tireless founder and shepherd of the graduate mission of this Law School. In his travels abroad, teaching and directing the summer China Program, lecturing on American law in China, and recruiting LL.M. students, Jeff is frequently presented with gifts and documents of appreciation. One of those documents, framed and hanging on the wall of Jeff's office, refers to him as "Your Excellency." It may be a privilege of long-standing friendship that some of us exercise when we address him as "Your Excellency."

Another of Jeff's programmatic brain children, the Distinguished Jurist in Residence program, no longer with us in name, remains vibrant in effect and continues to be prominent in the identity of the School. It was Jeff's idea to recruit prominent judges from across the country to spend a few days at the Law

School, engage with students in classes of interest to the judges and in informal chats with them, participate in colloquia with the faculty, and present their ideas to the larger community. Through many years, that program attracted many judges, and their visits still resonate in the minds of many former students and faculty. More recently, and through the good offices of our colleague James White, we have hosted several visits by United States Supreme Court Justices, and those visits conform to the model that Jeff originally envisioned, though necessarily shorter in duration.[5] In fact, in 2007 Jeff was instrumental in bringing Justice Samuel Alito to the School. The legacy of that program creates the feel of a school of law with deep professional and intellectual connections with the judiciary, allowing our students to engage the judges in direct dialogue as well as experiencing their human side to complement daily exposure to them through their written opinions.

A strong tradition of intellectual exchange among those of us who inhabit this institution and with colleagues from other institutions is also an aspect of the identity of this School. Jeff Grove has played an indispensable part in creating and fostering that tradition. Early in his years as Associate Dean for Academic Affairs, Jeff conceived of a regular series of faculty colloquia, in which colleagues would share their scholarly works in progress with colleagues in an informal, social setting, complete with refreshments. Employing diplomatic aplomb at his best, he overcame the natural reluctance of some younger colleagues to air their scholarly thinking in front of senior colleagues before those thoughts were "ready for prime time." Jeff began the program that now flourishes and involves a substantial number of the faculty regularly in the Faculty Lounge once or twice a week most weeks of any given semester. The program, carried forward in recent years by former Associate Dean for Academic Affairs Andrew Klein to include a regular exchange of young scholars with other law schools, has produced as strong a "feel" in this institution of open and collegial exchange of ideas at the highest levels of inquiry, sustained analysis, constructive critique, and moral support that any community of scholars could desire.

Collegiality is an important value for Jeff. His door is always open, not only to students—whose visits to "Dean Grove's" office are frequent and likely to be of some duration—of course, but also to colleagues. One cannot simply poke one's head in his door to say hello; Jeff's welcoming manner and genuine good

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5. United States Supreme Court Justices who have visited the School include Justice Kennedy, Justice O'Connor, Justice Ginsburg, and most recently, Justice Alito. Judges who visited during the original program include Judge Ruggero Aldisert, U.S. Court of Appeals for the Third Circuit; Judge Alfred T. Goodwin, U.S. Court of Appeals for the Ninth Circuit; Chief Justice Robert F. Utter, Washington Supreme Court; Judge Prentice H. Marshall, U.S. District Court for the Northern District of Illinois; Chief Justice James G. Exum, North Carolina Supreme Court; Judge Robert L. Carter, U.S. District Court for the Southern District of New York; Justice Martha Craig Daughtrey, Tennessee Supreme Court; Judge Patricia McGowan Wald, U.S. Court of Appeals for the District of Columbia Circuit; and Chief Judge Emeritus A. Leon Higginbotham, Jr., U.S. Court of Appeals for the Third Circuit.

cheer in interacting with colleagues is irresistible as he always invites the quick visitor in to sit down for a longer chat. He also frequently shows up at the doors of colleagues, whether to discuss an interesting case, a matter of Law School business, or (more frequently) to share a humorous story or joke. He has carried his warm invitational tendency to greater lengths by hosting many faculty social functions in his home. Many candidates for faculty positions and decanal appointments have also been his guests as they move through the hiring process. The result of these and other efforts have helped to produce a strong sense of collegiality and good will among colleagues as an important aspect of identity of this Law School. It has long been a favorite statement by members of the Faculty Recruitment Committee to tout the strong collegial feeling and activities of the faculty.

Identity is important to Jeff at a personal level as well. You have already read accounts of his sense of sartorial and tonsorial style and two other of his nicknames.[6] His expression of style and the nicknames are a direct reflection of Jeff's expression of personal identity. In his early years at this School Jeff garnered one more nickname not yet mentioned. If the reader has an opportunity to peruse the composite photographs of graduating classes of the Law School displayed in the Ruth Lilly Law Library, the reader will see in the composites from the mid-seventies that Jeff's hairstyle was clearly in the mainstream of "thirty-somethings" of that era. Those carefully-clipped helmet-shaped locks earned him the nickname "Prince Valiant" for many years, and some of our older alumnae still refer to him (fondly) with that moniker.

Space limits force a conclusion here, though I could write much more. Suffice it to say that if ever the appellation "institution-builder" pertained to a person associated with this Law School, it would be Jeffrey W. Grove. "Dean Grove" richly deserves to be immortalized in artistic form and to have his portrait hang in the law school gallery.

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6. *See* Bepko, *supra* note 2, at 274.

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IMPROVING RELATIONS BETWEEN CONGRESS AND THE FEDERAL COURTS: AN INTRODUCTION

TIM A. BAKER*

INTRODUCTION

Former U.S. Supreme Court Justice Sandra Day O'Connor wrote in a 2006 *Wall Street Journal* article, "[T]he breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."[1] The Honorable Joel Flaum, former Chief Judge of the Seventh Circuit Court of Appeals, echoed this sentiment when he stated that same year that "[i]n my 32 years as a judge I have never seen relations between the judiciary and Congress more strained."[2] Others have suggested, however, that court-directed animus has existed since the founding of our nation and that recent attacks by politicians against the judiciary are neither particularly alarming nor notably worse than judges might inflict against a colleague by way of a stinging dissenting opinion.[3]

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* U.S. Magistrate Judge, U.S. District Court, Southern District of Indiana, http://www.insd.uscourts.gov/Judges/bio_TAB.htm (last visited Sept. 18, 2007). The Author served as the Chair of the Indiana State Bar Association's Federal Judiciary Committee, which organized the September 14, 2007 "Conference on Relations Between Congress and the Federal Courts," the subject of this Article.

1. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

2. Pamela A. MacLean, *Judges Warned About Seminars: Departing Judge Notes Expense-Paid Functions Will Sour Congress More*, NAT'L L.J., May 29, 2006, at 5.

3. *See, e.g.*, CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 2 (2006) ("Bouts of court-directed animus have come and gone at generational intervals since the founding of the nation."); Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 930 (2007) ("Public criticism of the federal courts is nothing new. For as long as there has been a Federal Judiciary, federal judges have been blasted for purportedly overstepping their bounds."); William H. Pryor, Jr., *'Neither Force nor Will, but Merely Judgment,'* BENCHER, Jan.-Feb. 2007, at 12, 12 ("To charge that the current disappointment regarding judges is unprecedented is to diminish the

It is true that attacks against the judiciary are nothing new, but a compelling argument can be made that the present relationship between Congress and the federal judiciary is strained to the breaking point. Such a conclusion seems justified on various fronts and is supported by a growing list of emotionally charged comments aptly illustrated by the chief-of-staff to Oklahoma Senator Tom Coburn who said, "I don't want to impeach judges. I want to impale them!"[4]

In response to this type of growing and disconcerting rhetoric, the Indiana State Bar Association ("ISBA") sponsored a "Conference on Relations Between Congress and the Federal Courts" ("ISBA Conference") on September 14, 2007. The day-long conference, hosted by the Indiana University School of Law—Indianapolis, brought together congressmen, judges, and academics to explore the root problems of this relationship and lay a foundation for improved relations. U.S. Supreme Court Justice Samuel A. Alito, Jr. provided the ISBA Conference's keynote address. This Article provides an introduction to and an overview of the ISBA Conference and the foregoing issues.[5]

Overview of Problems and Possible Solutions

To be sure, some criticism of the judiciary and judicial decisions is entirely appropriate if not essential.[6] However, according to Justice O'Connor, "the breadth of the dissatisfaction currently being expressed—not only by public officials, but also in public opinion polls—indicates that the level of anger

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sacrifices that earlier giants of the judiciary endured. . . . Many contemporary criticisms of judicial decisions by politicians are no more heated than the criticisms written by jurists in dissenting opinions.").

4. Bert Brandenburg, *The Growing Threat to Fair and Impartial Courts: How Judges and Attorneys Can Fight Back*, BENCHER, Jan.-Feb. 2007, at 19, 20; Rick Perlstein, *Christian Empire*, N.Y. TIMES, Jan. 7, 2007, at 15 (reviewing CHRIS HEDGES, AMERICAN FASCISTS: THE CHRISTIAN RIGHT AND THE WAR ON AMERICA (2007)). Professor Geyh sets forth other examples:

> In 1997, the Republican House majority whip proposed to "go after" liberal judicial activists in a "big way" by targeting them for impeachment. Six years later, the chairman of the Constitution Party National Committee called for the impeachment of the six-member majority of the Supreme Court that decided the homosexual sodomy case. On the other side of the political aisle, the Oregon Democratic Party initiated a campaign in 2001 to impeach the Supreme Court majority that decided *Bush v. Gore*.

GEYH, *supra* note 3, at 3-4 (footnotes omitted).

5. The remarks of the speakers at the Conference appear at Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* 41 IND. L. REV. 305 (2008) [hereinafter ISBA Conference]. However, Justice Alito requested that his remarks not be recorded, accordingly, his remarks are not set forth.

6. "Many who complain about criticisms of the judiciary concede that some criticism of judicial decisions is fair. That assessment is too mild. Occasionally criticism of judicial decisions is essential to the progress of our constitutional republic." Pryor, *supra* note 3, at 13.

directed toward judges today exceeds that of the past."[7] Supreme Court Justice Stephen Breyer, among others, fears that such criticism threatens to undermine the judicial system. As Justice Breyer points out, "the judiciary is, in at least some measure, dependent on the public's fundamental acceptance of its legitimacy. And when a large segment of the population believes that judges are not deciding cases according to the rule of law, much is at stake."[8]

Justice Alito[9] expounded on this idea at the ISBA Conference in discussing his Supreme Court confirmation process, which he characterized as the three most difficult months of his life.[10] Justice Alito was successfully guided through this difficult process by the Honorable Daniel R. Coats,[11] former Ambassador to the Federal Republic of Germany and former U.S. Senator from Indiana, who introduced the newest Supreme Court Justice at the ISBA Conference. Ambassador Coats used his introductory remarks to discuss and explain what he called his "sherpa" role in leading the jurist through the thorny confirmation process.[12] Picking up on the sherpa theme, Justice Alito made an analogy

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7. Sandra Day O'Connor, Associate Justice, Retired, Supreme Court of the United States, Remarks at the Georgetown University Conference, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), *in* 95 GEO. L.J. 897, 898 (2007).

8. Stephen Breyer, Associate Justice, Supreme Court of the United States, Remarks at the Georgetown University Conference, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), *in* 95 GEO L.J. 903, 903 (2007). Likewise, William N. LaForge, President of the Federal Bar Association, wrote in a recent article, "At minimum, inappropriate criticism of the judiciary undermines public confidence in the judiciary and in judicial independence, regardless of whether the criticism actually influences decision-making." William N. LaForge, *Judicial Independence: An Age-Old Concept Is Alive and Well but Has Contemporary Challenges*, FED. LAW., Nov.-Dec. 2006, at 3, 10.

9. Justice Alito joined the Supreme Court of the United States as an Associate Justice on January 31, 2006, leaving his service to the Court of Appeals for the Third Circuit to which he was appointed in 1990. Supreme Court of the United States, The Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Nov. 20, 2007). Justice Alito also served as U.S. Attorney, District of New Jersey (1987-1990); Deputy Assistant Attorney General, U.S. Department of Justice (1985-1987); Assistant to the Solicitor General, U.S. Department of Justice (1981-1985); and Assistant U.S. Attorney, District of New Jersey (1977-1981). *Id.*

10. Samuel Alito, Associate Justice, Supreme Court of the United States, Keynote Address at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007).

11. Daniel R. Coats served as the Ambassador to the Federal Republic of Germany from August 2001 to February 2005. King & Spalding Homepage, Lawyers/Professionals, Biography, http://www.kslaw.com/portal/server.pt?space=KSPublicRedirect&control=KSPublicRedirect&BioId=5884 (last visited Jan. 3, 2008). He represented Indiana in the U.S. Senate from 1989 to 1999 and in the U.S. House of Representatives from 1981 to 1988. *Id.*

12. Former Ambassador Dan Coats, Introduction to Justice Samuel Alito at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* 41 IND. L. REV. 305, 337-38 (2008). Former Ambassador Coats's article, *Anatomy of a*

between the Supreme Court confirmation process and climbing Mount Everest: both experiences require the climber-nominee to pass dead bodies of failed climbers-nominees on the dangerous yet exhilarating ascent to the summit.[13]

Justice Alito focused his keynote remarks on three primary areas where he believes Congress should concentrate its efforts: (1) increasing judicial salaries, (2) managing growing caseloads, and (3) avoiding ambiguities in statutes.[14] Justice Alito also set forth three suggestions to help bridge the gap between what he termed the two cultures of legislators and judges.[15] First, legislators and judges need to make an effort to understand each other and the pressures facing each branch of government.[16] Second, members of both branches must exercise self-restraint with respect to their powers.[17] Justice Alito specifically recognized that judges must avoid catching what he referred to as "black robe disease," whereby judges overstep their authority after donning their judicial robes.[18] Third, Justice Alito stated that both branches must rise above the public cynicism of government.[19]

In addition to Justice Alito, the judiciary's perspective was further refined by a distinguished panel[20] of judges consisting of Chief Judge Larry J. McKinney of the Southern District of Indiana;[21] Judge Sarah Evans Barker of the Southern District of Indiana and President of the Federal Judges Association ("FJA");[22]

Nomination: A Year Later, What Went Wrong, What Went Right and What We Can Learn From the Battles over Alito and Miers, 28 HAMLINE J. PUB. L. & POL'Y 405 (2007), contains the statesman's insights into the brief, failed effort to confirm Harriet Miers to the Supreme Court and Justice Alito's successful nomination.

13. Alito, *supra* note 10.

14. *Id.* One example Justice Alito gave was lawmakers' failure to consistently indicate whether statutes should be applied retroactively. *Id.*

15. *Id.*

16. *Id.* Justice Alito correctly pointed out that legislators do not enjoy lifetime appointments as do Article III judges. *Id.* Moreover, legislators must be very visible and reach out to their constituents, whereas federal judges tend to operate largely out of the public eye. *Id.* Thus, the pressures and demands facing legislators and judges vary significantly and impact the manner in which they view one another and even themselves. *Id.*

17. *Id.*; *see also* Dinh, *supra* note 3, at 929.

18. Alito, *supra* note 10.

19. *Id.*

20. This Author moderated the panel, entitled "The View From the Courthouse."

21. Chief Judge McKinney was appointed U.S. District Court Judge for the Southern District of Indiana in July 1987 and served as Chief Judge from January 2001 to December 2007. U.S. District Court, Southern District of Indiana, Judges and Courtrooms, http://www.insd.uscourts.gov/Judges/bio_ljm.htm (last visited Nov. 20, 2007). Prior to serving on the U.S. District Court, he served as a judge on the Johnson Circuit Court in Indiana for eight and a half years. *Id.*

22. Judge Barker was appointed U.S. District Judge for the Southern District of Indiana in March 1984 and served as Chief Judge from 1994 to 2001. U.S. District Court, Southern District of Indiana, Judges and Courtrooms, http://www.insd.uscourts.gov/Judges/bio_SEB.htm (last visited Nov. 20, 2007). From 1981 to 1984, Judge Barker served as the U.S. Attorney for the Southern

Chief Judge Robert L. Miller of the Northern District of Indiana;[23] and Chief Justice Randall T. Shepard of the Indiana Supreme Court.[24] District Judges McKinney, Barker, and Miller echoed many of the concerns set forth by Justice Alito, but from a trial court perspective.[25]

Judge Barker called bills designed to strip lower federal courts of jurisdiction to hear particular types of cases a "distraction."[26] As discussed at the ISBA Conference, despite the introduction of many such jurisdiction-stripping bills, they generally have failed to be passed into law. Moving beyond this issue, Judge Barker used the ISBA Conference to emphasize the need for a substantial pay raise for federal judges.[27] In June 2007, Senator Patrick Leahy introduced legislation that would do just that.[28] The FJA is a strong advocate of the need for

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District of Indiana. *Id.*

23. Chief Judge Miller was appointed U.S. District Judge for the Northern District of Indiana in December 1985 and began serving as Chief Judge in 2003. U.S. District Court, Northern District of Indiana, http://www.innd.uscourts.gov/judges/miller/millerbio.shtml (last visited Nov. 20, 2007). He served as a judge for the St. Joseph Superior Court in Indiana from 1975 to 1986. *Id.*

24. Chief Justice Shepard was appointed to the Indiana Supreme Court in 1985. Indiana Supreme Court, Justice Biographies, http://www.in.gov/judiciary/supreme/bios/shepard.html (last visited Nov. 20, 2007). Justice Shepard served as Judge of Vanderburgh County Superior Court from 1980 until his appointment to the Indiana Supreme Court. *Id.*

25. Judge Sarah Evans Barker, Chief Judge Larry McKinney, Chief Judge Robert Miller, and Chief Justice Randall Shepard, View from the Courthouse Panel Discussion at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* 41 IND. L. REV. 305, 353-79 (2008). The ISBA Conference was held on September 14, 2007, in the Wynne Courtroom of Indiana University School of Law—Indianapolis.

26. *Id.* at 370. Examples of such bills include: Marriage Protection Act of 2007, H.R. 724, 110th Cong. (2007); Pledge Protection Act of 2007, H.R. 699, 110th Cong. (2007); We the People Act, H.R. 300, 110th Cong. (2007); and Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005). These bills, introduced in the House in various forms over the past couple of years, would generally have foreclosed or greatly limited lower courts' jurisdiction over issues such as the Pledge of Allegiance and same-sex marriage. *See* Kenneth M. Duberstein, Chairman and CEO, The Duberstein Group, Moderator of Panel on Interbranch Relations at Georgetown University Conference, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), *available at* http://www.law.georgetown.edu/news/documents/COJ092806-panel3.pdf ("[S]ome politicians have called [for] legislation that would strip the federal courts of jurisdiction over particular issues. Congressman Hostettler of Indiana advocated a bill that would bar the federal courts from hearing lawsuits related to gay marriage. Tom DeLay would have barred the courts from hearing cases regarding the constitutionality of the phrase, 'Under God,' in the pledge of allegiance.").

27. Barker, *supra* note 25, at 376.

28. The Federal Judicial Salary Restoration Act of 2007, S. 1638, 110th Cong. (2007) (referred to the Committee on the Judiciary on June 15, 2007). The Act would increase the salary of district judges from $165,200 to $247,800 and of circuit court judges from $175,000 to $262,700. *Id.* Supreme Court Justices would earn $304,500 under the proposed legislation, which also calls for the Chief Justice to earn a bump in pay to $318,200. *Id.*

a judicial pay raise, and as president of the FJA, Judge Barker has championed that message. Chief Justice John Roberts has likewise embraced this issue and repeatedly warned, "The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge."[29] Justice Shepard also spoke in favor of a judicial pay raise, noting the benefits of a recent pay increase for state court judges in Indiana.[30]

Another highlight of the ISBA Conference was a distinguished panel[31] of U.S. Congressmen from Indiana, consisting of Representatives Mike Pence,[32] Baron Hill,[33] and Brad Ellsworth.[34] Representative Pence, who sits on the House Judiciary Committee, spoke candidly about his view that judges have overstepped their authority, particularly with respect to what he termed banning religion from "the public square."[35] Representative Pence stated that the greatest threat to the judiciary in the twenty-first century is "elitism."[36] Representative Pence cited as an example of elitism the fact that the Ten Commandments are depicted at the U.S. Supreme Court and that prayer opens legislative and judicial proceedings, yet court decisions have prohibited such religious conduct in small

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29. Chief Justice John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 2007, at 1, 3. Others, however, remain unconvinced that judges need a pay raise. *See also* Erika Lovley, *Why Bankruptcy Judges Face Financial Dilemma*, WALL ST. J. , July 25, 2007; Bill Mears, *Increasing Justices', Federal Judges' Pay a Tough Sell*, CNN.COM, July 9, 2007, http://www.cnn.com/2007/US/07/09/judges.pay/index.html.

30. Shepard, *supra* note 25, at 377.

31. The panel, entitled "The View From the Capitol," was moderated by Professor Jeffrey W. Grove of the Indiana University School of Law—Indianapolis. Representative Brad Ellsworth, Representative Baron Hill, Representative Mike Pence, View from the Capitol Panel Discussion at the Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* 41 IND. L. REV. 305, 316-37 (2008).

32. Representative Pence represents the Sixth Congressional District of Indiana in the U.S. House of Representatives, where he has served since November 2000. Congressman Mike Pence: 6th District of Indiana, http://mikepence.house.gov/Biography (last visited Nov. 20, 2007). He describes himself as "a Christian, a conservative and a Republican, in that order." *Id.*

33. Representative Hill represents the Ninth Congressional District of Indiana in the U.S. House of Representatives. Congressman Baron Hill, Representing the 9th District of Indiana, http://baronhill.house.gov/bio.shtml (last visited Nov. 20, 2007). He serves on the House Energy and Commerce Committee and the House Science and Technology Committee, and is part of the Blue Dog Coalition and the New Democrat Coalition. *Id.*

34. Representative Ellsworth represents the Eighth Congressional District of Indiana in the U.S. House of Representatives. The Online Office of Congressman Brad Ellsworth, http://www.ellsworth.house.gov (follow "About Brad" hyperlink) (last visited Nov. 20, 2007). Like Representative Hill, Representative Ellsworth also is a member of the Blue Dog Coalition. *Id.* Representative Ellsworth sits on the Armed Services, Agriculture, and Small Business Committees. *Id.*

35. Pence, *supra* note 31, at 328-29.

36. *Id.*

towns such as Winchester, Indiana.[37] All three federal legislators voiced support for a judicial pay raise, including Representative Ellsworth, who has personally vowed not to accept a pay raise until the federal budget is balanced.[38]

Two notable academics rounded out the ISBA Conference. First, Professor Gerard N. Magliocca of Indiana University School of Law—Indianapolis spoke on the topic: "The Chief Justice on Capitol Hill: Opening a Dialog Between the Branches."[39] Professor Magliocca proposed that relations between Congress and the judiciary could be improved by utilizing an approach similar to that undertaken by the chairman of the Federal Reserve Board.[40] Pursuant to the Humphrey-Hawkins Full Employment Act,[41] the chairman of the Federal Reserve Board provides testimony to the Senate and House Banking Committees twice a year on the state of monetary policy.[42] Professor Magliocca suggested that the Chief Justice of the Supreme Court provide similar testimony on the state of the judiciary in order to improve communications and relations between Congress and the Supreme Court.[43] Professor Magliocca's proposal was discussed and considered by several conference speakers, including Chief Justice Shepard, who delivers an annual State of the Judiciary speech to Indiana legislators.[44]

Finally, Professor Charles Gardner Geyh of Indiana University School of Law—Bloomington spoke on the topic: "Judicial Independence: Does the Public Really Care?"[45] He discussed whether, in the grand debate of attacks against the

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37. *Id.* at 328.

38. Ellsworth, *supra* note 31, at 334.

39. Gerard N. Magliocca, The Chief Justice on Capitol Hill: Opening a Dialog Between the Branches, Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* 41 IND. L. REV. 305, 307-16 (2008). Professor Magliocca, Professor of Law at the Indiana University School of Law—Indianapolis since the fall of 2001, teaches torts, constitutional law, intellectual property law, legal history, and admiralty. Indiana University School of Law—Indianapolis, http://indylaw.indiana.edu/people/profile.cfm?Id=40 (last visited Nov. 20, 2007).

40. Magliocca, *supra* note 39, at 308-09, 312-14.

41. 15 U.S.C. § 3101 (2000).

42. *Id.*

43. Magliocca, *supra* note 39, at 308-09, 312-14. Professor Magliocca readily conceded that, due to separation of powers, Congress could not compel the Chief Justice to give such sworn testimony, as the Humphrey-Hawkins Act requires of the chairman of the Federal Reserve Board. *Id.* at 312.

44. Shepard, *supra* note 25, at 357-58.

45. Charles Gardner Geyh, Judicial Independence: Does the Public Really Care?, Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* IND. L. REV. 305, 339-53 (2008) [hereinafter Geyh, Judicial Independence]. Professor Geyh is the John F. Kimberling Professor of Law at the Indiana University School of Law—Bloomington, where he has taught since 1998. Charles Geyh, John F. Kimberling Professor of Law, Indiana University School of Law Bloomington, http://www.law.indiana.edu/directory/cgeyh.asp (last visited Nov. 20, 2007). Professor Geyh has authored, among other works, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System.* GEYH, *supra*

judiciary and threats to judicial independence, the public really cares. Ultimately, Professor Geyh surmised that the public really is concerned about these issues, though this conclusion was hardly foregone. Professor Geyh also noted that "if Congress wanted to drive the federal judiciary to its knees, it could do it tomorrow" but has not done so due to a custom of judicial independence that has developed over the past 230 years.[46]

CONCLUSION

Relations between Congress and the federal judiciary need to be improved. This need is not altogether surprising. As discussed at the ISBA Conference, these branches of government have experienced strained relations throughout the nation's history.[47] Nor is this friction altogether bad, for the Constitution "creates somewhat of a built-in tension between the concepts of judicial independence on the one hand and judicial accountability on the other hand."[48] To some degree, such tensions are part of the genius of the checks and balances of America's tripartite system of government.

But if allowed to simmer unchecked, such built-in tensions will boil over, resulting in a dysfunctional government that threatens the very fabric of the republic. The ISBA Conference presented an opportunity for legislators and judges to put aside their differences, to examine the root causes of this strained and delicate relationship, and to begin mending relations. Justice Alito rightly acknowledged during his keynote remarks that the ISBA Conference could help improve relations between Congress and the federal courts.[49] Now, it is up to Congress and the federal judiciary to build upon this foundation and nurture this relationship back to health.

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note 3.

46. *See* Geyh, Judicial Independence, *supra* note 45, at 342-43.

47. *See generally* ISBA Conference, *supra* note 5.

48. LaForge, *supra* note 8, at 9. LaForge explains that the Constitution makes the federal judiciary independent of the political branches by giving judicial power exclusively to the judiciary. *Id.*

> But, at the same time, the Constitution makes the judiciary dependent on . . . the political branches of government by giving the other two branches the powers to nominate and confirm . . . federal judges, to impeach and remove federal judges, to establish the lower federal courts, to regulate court jurisdiction, and to make any laws necessary and proper for the exercise of the foregoing powers, including the powers to fund and oversee court operations.

Id.

49. *See* Alito, *supra* note 10.

THE CHIEF JUSTICE ON CAPITOL HILL: EXTENDING THE HUMPHREY-HAWKINGS MODEL

GERARD N. MAGLIOCCA*

There is a growing feeling, reflected by the urge to hold this Conference, that relations between Congress and the federal courts are terribly strained. In a recent *Wall Street Journal* column, Justice Sandra Day O'Connor expressed concern about legislative assaults on judicial independence and stated that "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."[1] During prior periods of interbranch tension, however, federal judges were impeached on partisan grounds,[2] the appellate jurisdiction of the Supreme Court was sharply restricted,[3] and Congress enacted (or threatened to enact) statutes to pack the courts and override judicial resistance.[4] Since nothing even close to these dramatic acts is being considered nowadays, Justice O'Connor's alarm about overt hostility towards the courts is almost certainly unwarranted.[5]

Nonetheless, all is not well between the legislative and judicial branches.

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* Professor of Law, Indiana University—Indianapolis. Many thanks to Samuel Adams for his research assistance and to Jeff Grove, Judge Timothy Baker, and the Indiana State Bar Association for making this event possible. The Author made a presentation of this Article at the Conference. Gerard N. Magliocca, The Chief Justice on Capitol Hill: Opening a Dialog Between the Branches, Indiana State Bar Association Conference on Relations Between Congress and the Federal Courts (Sept. 14, 2007), *in* 41 IND. L. REV. 305, 307-16 (2008).

1. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

2. *See, e.g.*, WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 20-23 (1992) (discussing the impeachment of Justice Samuel Chase by the Jeffersonians for his pro-Federalist views).

3. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 223-27, 241-42 (1998) (discussing Congress's removal of habeas jurisdiction to block litigation challenging the constitutionality of military arrest reconstruction); *see also Ex parte* McCardle, 74 U.S. 506, 513-15 (1869) (upholding this action, but reading the jurisdiction repeal narrowly).

4. *See* GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 68 (2007) (stating that in 1837 Congress increased the number of circuits and Justices to give President Jackson additional appointments); *see generally* JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS (1938) (chronicling the failure of the more famous Court-packing plan proposed by Franklin D. Roosevelt one hundred years later).

5. Typically, friction between the elected branches and the courts reaches a peak during moments of transition between constitutional movements that are committed to different first principles. *See* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 315 (1941) ("The judiciary is . . . the check of a preceding generation on the present one; a check of a conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being. . . . This conservative institution is under every pressure and temptation to throw its weight against novel programs and untried policies which win popular elections."). These unusual political conditions, however, do not exist now and thus cannot explain the current discomfort with how Congress and the judiciary are interacting.

While Congress and the Supreme Court are getting along just fine, federal district and circuit judges are facing unprecedented burdens created by congressional neglect. As one judge told me in a private conversation, the courts can write opinions identifying flaws in federal statutes or administrative procedures that cry out for a legislative remedy, but the question is whether anyone in Congress reads them.[6] When the Justices speak, everybody listens. When a few federal judges out of hundreds raise issues, though, their views often cannot break through the din of public discourse.[7] The modern threat to judicial independence comes more from congressional inaction than from the familiar danger posed by legislative action to control the courts.

Though Congress's refusal to raise judicial salaries gets the most attention in this respect,[8] a more important example involves the ongoing crisis in immigration asylum appeals. Following the September 11, 2001, terrorist attacks, the Justice Department issued new regulations to curb the administrative review of deportation orders.[9] In particular, the Board of Immigration Appeals (the "Board") was cut in size, which forced the Board to start issuing summary affirmances in most cases because it lacked the resources to do more.[10] Since the next (and, for all practical purposes, final) level of review for asylum applications is in circuit courts, the Board's emasculation created an avalanche

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6. For one novel idea on what could be done about this, see Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007) (arguing that courts should be able to certify questions on ambiguous statutory issues to Congress and get a clarification before issuing a final decision).

7. The inability of judges to get their concerns heard is exacerbated because there are many more of them than there used to be (particularly when compared to the nineteenth century), and thus the power of each individual judge to reach the wider public is diluted. Moreover, the constitutional and statutory authority of the federal courts is much greater than before, which means that it is easier for judicial concerns to get lost in the shuffle than was the case when federal power was confined to a discrete set of topics.

8. *See* Robert Barnes, *Chief Justice Urges Pay Raise for Judges: Court's Viability at Stake, Roberts Says*, WASH. POST, Jan. 1, 2007, at A3 (quoting Chief Justice John Roberts's assessment that "the failure to raise judicial pay" has "reached the level of a constitutional crisis and threatens to undermine the strength and independence of the federal judiciary"). Article III, Section 1 of the Constitution tries to secure judicial independence by prohibiting Congress from reducing judicial salaries. *See* U.S. CONST. art. III, § 1 (stating that judges shall get "a Compensation, which shall not be diminished during their Continuance in Office"). Nothing requires Congress to raise their pay to keep up with inflation, however, even though a decline in the real value of judicial salaries over time presents a similar problem.

9. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

10. *See* David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1148-49 (2007); *see also* Iao v. Gonzales, 400 F.3d 530, 534-35 (7th Cir. 2005) (blasting the "[a]ffirmances by the Board of Immigration Appeals either with no opinion or with a very short, unhelpful, boilerplate opinion").

of new cases that come directly from a single immigration judge and often have no record or analysis to examine.[11]

Across the ideological spectrum, circuit judges are using the most pointed language they can to expose this sorry state of affairs and seek relief from Congress or from the Executive Branch.[12] In the Seventh Circuit, Judge Richard Posner says "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[13] In a similar vein, the Ninth Circuit recently said that it was being asked to review "a literally incomprehensible opinion by an immigration judge (IJ),"[14] while the Third Circuit said in another case that "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."[15] In spite of these emphatic statements from the bench and a report from the Judicial Conference pleading for help, no action is being taken to ease this burden that effectively turns circuit courts into an arm of the Executive Branch.[16]

Something must be done to raise the profile of the challenges facing the federal courts, and my suggestion is that Chief Justice John Roberts should be asked to testify on a regular basis before Congress in his capacity as head of the

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11. *See* Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (stating that the result of this arrangement is that the Seventh Circuit reverses the Board about 40% of the time); Solomon Moore & Ann M. Simmons, *The Nation; Immigrant Pleas Crushing Federal Appellate Courts: As Caseloads Skyrocket, Judges Blame the Work Done by the Board of Immigration Appeals*, L.A. TIMES, May 2, 2005, at A1 ("The [Board of Immigration Appeals's] reliance on one-sentence opinions has forced circuit courts to spend more time researching and deliberating the immigration cases that come to them. . . .").

12. *See, e.g.*, N'Diom v. Gonzales, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (identifying "the significantly increasing rate at which adjudication lacking in reason, logic, and effort from other immigration courts is reaching the federal circuits"); Ming Shi Xue v. Bd. of Immigration Appeals, 439 F.3d 111, 114 (2d Cir. 2006) ("[T]he position of overburdened immigration judges and overworked courts has become a matter of wide concern."); *Benslimane*, 430 F.3d at 830 ("[T]he power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice . . . .").

13. *Benslimane*, 430 F.3d at 830 (citing Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2004)); *see* Mece v. Gonzales, 415 F.3d 562, 572 (6th Cir. 2005) ("The Board's failure to find clear error in the immigration judge's adverse credibility determination leaves us, we are frank to say, more than a little puzzled."); *Niam*, 354 F.3d at 654 ("[T]he elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.") (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000))).

14. Recinos De Leon v. Gonzales, 400 F.3d 1185, 1187 (9th Cir. 2005); *see id.* at 1190 ("[W]e cannot tell what factual or legal determinations, if any, the IJ made. Accordingly, in many instances, we cannot determine what holdings of the IJ we should review.").

15. Wang v. Attorney Gen., 423 F.3d 260, 269 (3d Cir. 2005).

16. *See* Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1146 n.152 (2006) (stating that the Judicial Conference has requested more resources for immigration cases).

Judicial Conference.[17] In that forum, he would be ideally positioned to present the concerns of his Article III colleagues and to take questions about those points in a manner that is bound to attract plenty of media attention. Furthermore, there is an established model for this kind of hearing in the testimony that the Chairman of the Federal Reserve Board gives to Congress under the provisions of the Humphrey-Hawkins Act.[18] Extending this system to the Chief Justice would improve the dialogue between Congress and the courts while spurring action on matters of mutual concern.[19]

Twice a year, the Federal Reserve Chairman is required to testify to the Senate and House Banking Committees on the state of monetary policy. Since its inception in the 1970s as a way to lift the veil of secrecy from the central bank, these "Humphrey-Hawkins" hearings have become a much-anticipated event in financial circles because the Chairman's prepared statement offers useful insights into his views on the economy.[20] The hearings also allow members of Congress to question the Chairman and express their concerns about interest rates or other financial matters while letting the Federal Reserve give its views on the fiscal or regulatory issues that fall within Congress's authority. Naturally, there are informal ground rules on what topics are appropriate for discussion. The Chairman usually declines to answer questions that: (1) are highly partisan; (2) deal with subjects under the jurisdiction of the Treasury Department such as exchange rates; or (3) ask if interest rates are going up next month.[21] Despite these restrictions and the frequent mumbling of Alan

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17. *See* 28 U.S.C. § 331 (2000).

18. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended at 15 U.S.C. § 3101 (2000)); *see* Kelly H. Chang, *The President Versus the Senate: Appointments in the American System of Separated Powers and the Federal Reserve*, 17 J.L. ECON. & ORG. 319, 325 n.2 (2001) (describing the Federal Chairman's responsibility to testify under the Act).

19. A more direct approach (suggested by another panelist at this Conference) would be to create an interbranch commission that would propose reforms when necessary. *See* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1234-40 (1996).

20. The formal name for this testimony is the Monetary Policy Report, but the hearing is still referred to as "Humphrey-Hawkins." *See Semiannual Monetary Policy Report to the Congress: Before the H. Comm. on Financial Servs.*, 110th Cong. 7-60, 71-117 (2007) (testimony of Federal Reserve Chairman Benjamin S. Bernanke).

21. *See* Greg Ip, *Blunt-Talking Bernanke Warns of Inflation Risks—Remarks to Congress Suggest Interest-Rate Boost Is Likely: Industrials Hit 5-Year High*, WALL ST. J., Feb. 16, 2006, at A1 (noting the Chairman's "refusal to comment on many politically contentious issues"); Paulette Thomas, *Higher Rates Are Expected by Greenspan—Fed's Chief Tells Congress Rise Will Come but He Refuses to Cite a Time*, WALL ST. J., Feb. 1, 1994, at A2 (explaining that the Chairman "warned Congress that the Fed would boost short-term interest rates 'at some point,' but he refused to speculate about when it might do so"); *see also* Anthony Barrett, *Reforming the Fed: Its Independence and Lessons from Humphrey-Hawkins*, 9 CONTEMP. POL'Y ISSUES 76, 80 (1991) (describing Chairman Volcker's refusal to comment on the wisdom of President Reagan's tax cuts).

Greenspan, this process has been quite successful in getting Congress and the Federal Reserve to share information and improve the transparency of monetary affairs.

While the Federal Reserve Chairman is not a constitutional officer, his role is analogous to the Chief Justice because each stands at the head of a powerful public institution that is independent from political control. Indeed, the Federal Reserve is sometimes described as the "fourth branch" of government because its autonomy is now settled as a constitutional custom.[22] Of course, one difference is that the Federal Reserve was created by statute and hence the Chairman can be compelled to appear as a witness. By contrast, separation-of-powers principles almost certainly prohibit Congress from forcing the Chief Justice to testify. Another relevant distinction is that while the Chairman only holds one vote on the Federal Reserve Board, in practice he runs monetary policy and can be held accountable by Congress for any statements he makes on that subject. The Chief Justice, on the other hand, does not run the federal judiciary (he does not even run the Supreme Court), thus he cannot make binding pledges in any testimony he may give.

Nonetheless, these distinctions do not undermine the central point, which is that if the Chief Justice testified in manner similar to the Humphrey-Hawkins model, it could improve relations between the branches. There is ample precedent for sitting Justices to provide voluntary testimony to Congress. In recent years, one or two Justices have come before a House subcommittee to explain the details of the Court's budget request.[23] During those hearings, the Justices do take questions about the Court, although they are usually not asked about the rest of the judiciary. And earlier this year, Justice Kennedy testified on a wide range of matters, including judicial salaries, before the Senate Judiciary Committee.[24] While these adhoc exchanges are useful and serve to educate the public, a more regular and formal arrangement would be better, especially if that process focused on the concerns of district and circuit courts.

If the Chief Justice were willing to take on the task of testifying before Congress, there would, of course, have to be limits on what he could be asked. Just as the Federal Reserve Chairman does not discuss future decisions on interest rates, the Chief Justice should not be expected to give his views on upcoming cases or provide opinions on pending legislation. Judicial confirmation hearings provide a template as to how far the question-and-answer

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22. *See, e.g.*, BERNARD SHULL, THE FOURTH BRANCH: THE FEDERAL RESERVE'S UNLIKELY RISE TO POWER AND INFLUENCE (2005). By a constitutional custom, I mean a practice that is so deeply ingrained that changing it would shatter the expectations of public and private actors and is, as a practical matter, impossible.

23. *See, e.g.*, Linda Greenhouse, *2 Justices Indicate Supreme Court is Unlikely to Televise Sessions*, N.Y. TIMES, Apr. 5, 2006, at A16 (describing the appearance of Justice Kennedy and Justice Thomas before a House subcommittee).

24. *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 6-33, 69-80 (2007) (statement of the Honorable Anthony M. Kennedy, Associate Justice of the United States Supreme Court).

session should go. While members could certainly ask the Chief Justice about the Supreme Court (for example, television coverage of oral arguments), all participants should bear in mind that he would be appearing in his role as head of the Judicial Conference speaking for the judiciary as a whole, not in his capacity as the head of the Court speaking on behalf of the Justices.[25]

While Humphrey-Hawkins provides a sound process for the questioning of the Chief Justice, the substance of his statement would present more difficult issues. Critics might argue that among the diverse membership of the federal courts there is no consensus on anything except wanting more money. Likewise, there would be a concern that federal judges should not lobby Congress because that would create a conflict of interest if any desired statutory changes are later attacked on constitutional grounds in subsequent litigation. The answer to both points is the same—the Chief Justice should use his appearance as a bully pulpit to expose concerns that are shared by colleagues, but should not endorse any specific solutions.[26] This way, conflict-of-interest claims can be avoided, and it would be easier for the Chief Justice to forge a consensus, in consultation with the chief judges of each circuit or any other body of the Judicial Conference he might want to convene, on appropriate subjects for his testimony.

In sum, we face a subtler problem in congressional-judicial relations than was true during the intense confrontations of the past. Instead of restraining the excesses of judicial review and legislative action, we need to prod both sides into taking more action to prevent the slow decay of judicial independence. The regular appearance of the Chief Justice on Capitol Hill could help achieve this end and open a new era in interbranch dialogue.

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25. Another reason for the Chief Justice to testify is that he now possesses considerable administrative powers—unconnected to his duties as a judge—but is not subject to congressional oversight like all other agencies. *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1585-86 (2006).

26. In essence, this would be no different from the content of the annual report on the judiciary that the Chief Justice currently gives to Congress. *See* 28 U.S.C. § 331 (2000).

Conference on Relations Between Congress and the Federal Courts

A Stenographic Record*

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STATE BAR PRESIDENT EYNON: Good morning. My name is Richard Eynon, and I'm President of the Indiana State Bar Association. I'm pleased and privileged to be able to be the first person to address you in what proves to be a very exciting day, we hope, and I know it will be in our exchange with the Congress and the judiciary, and also academia is involved as well today.

There are some things that I need to do; some people I need to thank. First of all, I want to thank all of you who have come to participate in this Conference. The time that I've been allotted will not allow me to go through the list of distinguished guests, speakers, panel members, from Justice Alito on down, Chief Justice, and the federal court, so I will dispense with even attempting to do that. Those speakers and panelists will be recognized and introduced in a proper way as the day goes on.

I want to thank Dean Roberts for allowing us to use this wonderful facility for the purpose of this Conference. I want to thank his staff and the people here at Indiana University ("IU") for their hospitality.

I also want to thank the staff of the Indiana State Bar Association ("ISBA"). To put on a project such as this is not a diminutive matter. It is something that takes a lot of time. Our events chairperson, Ashley Higgins, should be commended for all the work she has done and the other members of the staff. If you have a chance to see Ashley, you might want to thank her. I know that I do.

I also want to thank Judge Magistrate Baker and the Federal Judiciary Committee members of the state bar who took what was an idea last October, and I mean it was just an idea, and have transformed that idea into reality for all of us today. The staff they have accumulated and the people that will be presenters today, it's an unbelievable staff, and they have put this together in what amounts to, from a planning standpoint, a very short period of time.

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* James P. Connor, Transcriber, Connor + Associates, Inc., 1650 One American Square, Indianapolis, IN 46282, (317) 236-6022. This is a stenographic record of the "Conference on Relations Between Congress and the Federal Courts" hosted by the Indiana State Bar Association and held on September 14, 2007, at the Indiana University School of Law—Indianapolis, Wynne Courtroom, Inlow Hall. This stenographic record has been edited for publication.

There are a couple of housekeeping items that I need to talk to you about as well. Number one, as always, if you haven't turned off your cell phones, please do so now. Justice Alito has security, and other security people are here with our state people and the Congress representatives. We do not want to get anyone upset, so please turn off the cell phones; at best, vibrate.

Also, for any members of the press that may be here, I want to announce that as each presenter, speaker, or panelist comes forward, there will be allotted a two-minute period of time for the press to come up in the front and take whatever photos they want. At the end of the two minutes, you're asked to return to your seat. That will be enforced. We need to announce that ahead of time.

I, as I said a minute ago, am very pleased and I am as anxious as you all are to hear what will be presented to us today, not only from Congress and the judiciary, but from academia as well, as we have some speakers from that walk of life that I think will intersperse their knowledge and wisdom along with that of the other participants. I look forward to a very, very enjoyable conference and I hope you will do the same. Thank you.

(Applause)

DEAN ROBERTS: Should I wait for the two minutes for the press to come in?

(Laughter)

STATE BAR PRESIDENT EYNON: I did say distinguished, but no, no.

Opening Remarks

DEAN ROBERTS: Well, it's my pleasure to officially welcome you. I don't know how many of you even know who I am. I am Gary Roberts. I'm the new dean here. I've been on the job about ten weeks; it seems like about five years. But it's a great job, and I'm excited to be here to lead this School over the next several years to bigger and better things. I'm very proud of this School. I'm very proud of this facility, and I'm delighted that you all can be here to enjoy it with us today.

This is really an honor. It's my first opportunity to host an event at the Law School, and what a great one it is for my first time out of the blocks. So, we're going to have a beautiful day outside. When this is all over today, you can go across the street and enjoy the Irish Festival, but until then we're going to have a fabulous program.

I was going to go through and thank all the people. This is a great opportunity for me because I get to stand up here and be your host and welcome you, and I didn't have to do a thing. The folks at the Indiana State Bar Association did it all. And Tim Baker, who is the chair of the organizing committee, did a fabulous job. I know I worked with our Associate Dean and Professor Jeff Grove, who was our representative on that committee, who did a great job. Ashley, I was in touch with her, and she was working around the clock. So, all of these folks who worked so hard to make this a great event deserve our appreciation.

I know you didn't come here to listen to me, so I will stop at that point and just tell you that I hope you have a great day. It's also my privilege now to

introduce our first speaker, who is a terrific young member of our faculty, a real rising star in legal academia.

Gerard Magliocca came to this Law School about six years ago, in 2001. He started out as an undergraduate and graduated from Stanford, and then unfortunately he couldn't get into a good law school, so he went to Yale. He got out in 1998, clerked for Judge Calabresi on the Second Circuit for a year, and then he went and joined my old law firm in Washington, D.C., Covington & Burling for a couple of years, and then he came here in 2001.

In the short time he's been here, he has been phenomenal. He's won teaching awards. He's been a prolific author, several articles. And I promised him I would hawk his book for him today—

(Laughter)

—Andrew Jackson and the Constitution.[1] Gerard is not only a constitutional law scholar and an intellectual property teacher, but he is also a legal historian. This is his first book. And I asked him if he was going to have a book signing during the reception today, but he said he's already out of them. It's already a best seller. So, I guess you'll have to go on Amazon.com to get a copy. But Gerard is going to talk to us today about the Chief Justice on Capitol Hill. So, I'll turn it over to Gerard Magliocca.

(Applause)

THE CHIEF JUSTICE ON CAPITOL HILL: OPENING A DIALOGUE BETWEEN THE BRANCHES[2]

Professor Gerard N. Magliocca
Indiana University School of Law—Indianapolis

PROFESSOR MAGLIOCCA: Well, good morning. Thank you, Gary.

I want to thank you all for coming and echo the comments made earlier about everyone who has worked so hard on this really terrific event. I think in the six years I've been at the Law School, there's never been a collection of speakers brought here like we have today. So, I hope you're all excited to be here.

Now, I think the reason that we're holding a conference on this topic of relations between Congress and the federal courts is that there is a feeling, though it hasn't quite ripened into a conclusion, that something is not quite right with how the branches are relating to each other. It reminds me of when I used to work in the press relations office of the State Department.

When we had no idea what was going on in a particular country, the instructions we were given was to say things were calm, but tense.

(Laughter)

So that might be a good characterization of how relations between Congress

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1. GERARD MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES (2007).

2. Gerard N. Magliocca, *The Chief Justice on Capitol Hill: Extending the Humphrey-Hawkins Model*, 41 IND. L. REV. 299 (2008).

and the courts are going these days.

While there are comments about this issue from several quarters, perhaps the most forceful points have been made by Justice O'Connor. Since she retired from the Court, she's been talking quite a lot about judicial independence. Indeed, she wrote an op-ed in the Wall Street Journal not too long ago in which she said, "The breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."[3]

Well, as a legal historian, I have to say that I think that statement is almost certainly wrong. Indeed, by historical standards, relations between the branches are quite good. We don't see a court-packing scheme the way we did during Franklin Roosevelt's administration. We don't see the impeachment of federal judges for partisan reasons as we saw during Thomas Jefferson's presidency. And we don't see broad efforts to strip the federal courts of jurisdiction the way we did during Reconstruction.

We don't even see the sorts of irritating burdens that Congress used to routinely inflict on the federal courts. Some of you may know that in the nineteenth century, Supreme Court Justices were required to ride circuit, which meant that for several months out of every year they would go around a particular set of states trying cases and hearing appeals. This part of the job was the one thing that made most people not want to be a Supreme Court Justice at the time. Not only was travel very difficult, being bounced along via stagecoach, but actually there are many instances in which justices were seriously injured by being thrown from a coach, and they would break an arm or they would break a leg or, in Chief Justice Marshall's case, break a collarbone.

Congress, when they didn't like what a particular justice was doing, would often expand the territory that they had to ride around in or reassign them to one that was bigger.

(Laughter)

We don't even see that sort of thing today. Nonetheless, I think we have some reason to be concerned. And so, in my talk today, I want to make three points about the current situation.

First, while I think things are going reasonably well between Congress and the Supreme Court, relations between Congress and the district and circuit courts have deteriorated. Now, ordinarily I would describe those courts as lower federal courts; but seeing as there are actual federal judges here, I will not use that term.

(Laughter)

Second, I think that this problem is a result more of congressional inaction or neglect than congressional action. And, in this respect, that makes the current situation different in kind from earlier problems between Congress and the courts.

Third, I think that the solution to this inaction or neglect is to create some mechanism, some more powerful mechanism, by which the concerns of the judiciary can be expressed to Congress and vice versa. And in that vein I want

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3. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A1.

to suggest, or this is sort of the proposal of the talk, that Congress and the Chief Justice collaborate on a system by which he would testify in his capacity as the head of the Judicial Conference on a regular basis, much like the chairman of the Federal Reserve currently testifies before Congress on the state of monetary policy.

Now, by way of background, typically relations between Congress and the courts reach a low point during periods of political realignment when you have the elected branches and the courts controlled by different and sharply divided constitutional philosophies. This is something that doesn't happen very often. It's usually a once every generation kind of phenomenon, and it was described best, I think, by Justice Jackson when he talked about the conflict between the New Deal and Franklin Roosevelt and the Supreme Court in the 1930s. He said,

> The judiciary is thus the check of a preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being. . . . This conservative institution is under every pressure and temptation to throw its weight against novel programs and untried [problems].[4]

I figure if you're going to have a lengthy quote, it might as well be from Justice Jackson.

(Laughter)

Now, what's going on today does not fit this paradigm. There has not been a realignment; there is not sharp division of the kind we've seen in previous periods. Certainly that time will come again as it has many times before. But if that's not the issue, which normally explains why there are problems between Congress and the courts, what is?

Well, I saw a federal circuit judge that I know not too long ago, and I mentioned to her that I was going to be giving a talk at this Conference. So, I asked her, "What do you think about relations between Congress and the courts?" And her response was, "Well, we can write terrific opinions pointing out problems in federal statutes, issues that Congress should be looking at, but does anybody read them?" Specifically, she wondered does anybody in Congress read them.

That got me to thinking that in the past the problem of judicial independence has always been one of Congress or the President taking actions to try to control the courts and limit their autonomy, some of the examples I mentioned earlier. But today I wonder if the problem isn't that the Congress and the President aren't paying enough attention to the problems of the courts. That, too, can erode their autonomy in a significant way.

I'm going to give you two examples of what I'm talking about, one of which is probably familiar to many of you and the other which probably is not. The first is judicial salaries, an issue that some people here have a vested interest in. For many years now the Chief Justice, Chief Justice Rehnquist, and then Chief Justice Roberts, have spoken about the failure of Congress to index judicial

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4. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 315 (1941).

salaries for cost of living and have noted that the failure to do so has led to a decline in the real value of these salaries. They are concerned, and other justices have expressed this concern as well, that it's harder to attract quality people to the bench. Though in fairness, I think that's probably true more in high cost-of-living areas than just everywhere. And there have been some high-profile instances of judges leaving the bench for private practice or for other jobs, in part because of salary concerns.

So far there hasn't really been any action on that. In part, this is because, according to the current framework, the salaries of judges are tied to the salaries of members of the Congress. You have to have one go up for the other to go up, and that creates certain problems. So, that's an issue that has gotten a lot of attention. The Chief Justice has written about this in his annual statement on the judiciary. In fact, he did so in January of this year.

Now, the more complicated example relates to the status of immigration asylum appeals. You cannot speak to a federal circuit judge these days for any more than about five minutes before they start talking your ear off about this terrible problem and why is it that nobody does anything about it. So, I thought I'd take the opportunity to sort of educate you a little bit about this. Obviously, if you're an immigration attorney, you probably already know, but for those of us who aren't, it's not something that's going to be in the news so much.

After September 11, the Department of Justice decided to streamline the procedures for processing petitions for political asylum by immigrants. Specifically what they did was they cut the size and budget of the Board of Immigration Appeals, which is the administrative appellate body that hears claims coming from immigration judges who have adjudicated a claim for asylum.

As a result of this cut in budget and size, the Board of Immigration Appeals simply does not have the resources to actually conduct a thorough review of cases from immigration judges. So, what they have done, basically, is turn to issuing one-sentence affirmances, just affirmed, stamp, and that's it.

Under the current statutory framework, petitioners who have been denied asylum can then take an appeal from the Board of Immigration Appeals to the federal circuits directly. This has resulted in a flood of appeals coming to the federal circuit courts, which have often a highly undeveloped record because all they have is what the immigration judge said. Now, I don't mean to disparage immigration judges; they're overworked, too. But, oftentimes they are not putting together a written opinion; they're not really putting together much of anything other than an oral description of "here's why I'm denying your petition for asylum." The circuit courts are immensely frustrated by having to review the record on this basis and are also frustrated by the fact that what was essentially an administrative task has been transferred to them.

Now, if you look in the materials that I provided for the CLE materials for this Conference, you'll see a long list of citations of recent court of appeals opinions in which judges are using very harsh language to describe what they're getting from the immigration judges and the failures of the system to adequately review and screen these cases. In this circuit, Judge Posner, some of you may know, has been very, very forceful in essentially saying that due process is not

being given to these applicants by the immigration judges and that, as a result, the reversal rate is quite high, approaching 50% in these cases.

There has been a report by the Judicial Conference asking for action to deal with this problem. There is a long list of opinions specifically asking for action. Nothing has happened. And to be fair, this is not entirely the fault of Congress. The executive branch also has the power to deal with this issue and hasn't done anything either.

Again, you can, to some degree, explain this by saying this issue, when it gets considered, tends to be tied up with the bigger issue of immigration reform, which is, of course, very difficult. But it raises a question both with respect to the judicial salary problem and with respect to this immigration appeal problem, why is nothing happening? What's the problem?

Well, I think the answer is that it's very difficult for these sorts of issues to sort of break through into the public consciousness or at least reach the consciousness of Congress, given all of the other issues that are out there in the public square. Now, note that this is not a problem for the Supreme Court. When the Supreme Court speaks, everybody pays attention. Indeed, even a single Justice can put an issue on the agenda in a separate opinion simply because the amount of activity by the Supreme Court is so low and because generally they're dealing with higher profile questions. This doesn't mean they always get action, but they at least have a better prospect of getting action.

By contrast, the work of the circuit courts and district courts is more bread and butter in nature. They're regulatory cases, they're immigration cases, they're intellectual property cases. They're not the types of subjects that are going to get a lot of attention in the media even though they're very important to the litigants involved and also for vast areas of public policy.

The other thing is that there are a lot more federal judges now than there used to be, and, thus, one particular federal judge has a more difficult time in raising an issue, or even, let's say a handful of judges, than used to be the case. Some of you may remember reading opinions by Learned Hand back in the day, and in his day there weren't very many federal judges. And, thus, it was possible for someone with stature in a prominent court to issue opinions that would get the attention of the bar and of Congress. Now it's just a lot harder. It's not impossible, but just much more difficult, I think, because there are so many voices out there.

Of course, there are ways for circuit and district court judges to communicate their concerns to policymakers. They can write opinions. They can come to events like this where we'll have members of Congress and there will be a chance for informal communication about matters of concern. The Judicial Conference also attempts to issue written reports on problems that they perceive.

But I don't think that these traditional tools are working so well. And we need to have some way of raising the profile of these concerns that the circuit and district courts have, both in the media and in Congress.

Professor Geyh, who you will hear from later today, has one proposal to deal with this which is to create an inter-branch commission of some kind made up by some judges, some members of Congress, whether current or retired, that could look at issues and then propose solutions for congressional action. So, since he

already came up with that idea, as I found, when I was doing research on this, I've got another idea I want to try to pitch.

And that is that the Chief Justice, who, by statute, is the head of the Judicial Conference, should volunteer to give testimony to Congress on a regular basis about issues of concern to the district and circuit courts. Now, this is not entirely unprecedented. Some years ago Chief Justice Berger, who many of you may know was not exactly known for his modesty, proposed that the Chief Justice give a speech every year to a joint session of Congress—a big event, and he would be kind of marched down the aisle just like the President is. Well, that didn't really go anywhere.

(Laughter)

But I think the idea behind it has some merit. The model that I'm looking at for how this could work is the testimony given by the chairman of the Federal Reserve to Congress. Under the provisions of the Humphrey-Hawkins Act of 1978,[5] the Fed chairman is required to come before the relevant committees of Congress twice a year to give testimony on monetary policy.[6] Usually this means he gives a statement and then takes questions. This statute was put in because there was a thought that it would help improve the transparency of the Federal Reserve and also would allow for better communication between Congress and the Fed on issues of mutual concern. Because, obviously, the Fed has an interest in Congress's fiscal policy, just as Congress has an interest in the monetary policy of the Fed.

Now, clearly the Federal Reserve chairman is not a constitutional officer as the Chief Justice is. However, in practical terms, the Federal Reserve is as powerful and as independent as the federal courts. That is sort of the institutional practice that has developed over the last ninety-some years since the Fed was created. So, I think it's appropriate to look to his role as an analogy here.

Now, when the chairman of the Fed testifies before Congress, there are some informal ground rules about what he will or will not comment on. For example, he won't comment on matters that are within the jurisdiction of the Treasury Department, such as exchange rate policy, and he won't comment on highly partisan issues like "what do you think about Iraq" or "what do you think about the proposal of the President on something like Social Security." Finally, he's not going to say whether they're going to raise interest rates next week.

Even with these limitations, I think most people in the financial community view these hearings as useful. They have improved the transparency of the Fed, and they have improved the dialogue with Congress even though sometimes it gets contentious, particularly in periods when the economy is not doing well or when interest rates are high.

I think that the same system could work for the Chief Justice, although there are some relevant distinctions. First, obviously, or it seems obvious to me, that consistent with separation of powers, Congress could not compel the Chief Justice to appear the way that they have with the Fed. He would have to

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5. 15 U.S.C. § 3101 (2000).

6. *Id.*

volunteer. Granted, he might look forward to this as much as going to a nervous dentist; however, there are some precedents for this. Earlier this year, Justice Kennedy testified voluntarily before the Senate Judiciary Committee on various matters, including judicial salaries. Every year usually two Justices come to the House to testify about the Court's budget, which is a venue for getting asked other questions that are unrelated to the budget.

Now, if the Chief Justice were to testify as the Fed chairman does, how would that work? Well, in some ways it wouldn't be all that much different from what the Chief Justice does in his annual statement on the federal judiciary, which is a written statement. That is, presumably he would come up with whatever consultative bodies that he would want to rely upon and try to forge a consensus on what issues ought to be presented or given a higher profile.

When he testified, there would again have to be some informal ground rules about what he could or could not say. Obviously, we would not expect the Chief to comment on pending cases. Obviously, we would not expect the Chief to comment on the constitutionality of pending legislation. And I think, also, a very important point is that we would not expect him to endorse a specific solution to a problem that he has identified or that his colleagues have identified. Because this would present some difficulties if the Chief Justice came out and said, "Well, I think the answer to the immigration asylum problem is X," that would create a significant conflict-of-interest problem should that solution then be challenged subsequently in a case, right? I mean, for one thing, somebody in a brief could cite, "hey, the Chief Justice said it was a great idea to somebody." But, also, it would put the Court in a difficult position should they have to rule on constitutionality of that matter. So, I think this would have to be limited to identifying problems and perhaps offering up some ideas without sort of coming down and saying, "Oh, well, we should do this," or, "We should do that."

Now, I think that such a hearing would be valuable for a couple of reasons. First, it would, by virtue of the fact that it's the Chief Justice or some other dignitary that he might designate, say another Justice, it would get a lot of attention. It would be covered on C-Span. It would be covered on cable news. And a lot of the issues that would ordinarily not get the attention of the public would be presented to them. The same could be said for Congress, which would get a chance to hear about problems that they might otherwise just not really be able to recognize.

Second, it would allow for Congress to air its views about what's going on with the courts. Granted, some of that might involve some grandstanding based on whatever the latest unpopular decision was, but there might be some value in that. Because one would think that in a dialogue sort of context, rather than just going out and issuing a press statement or something, you actually might get something productive out of that.

You know, people often comment when Justices are up for confirmation hearings that, "Oh, it's this wonderful educational opportunity for Congress, for the American people," and so on. Well, yes, it probably is. It's just unfortunate that that can only happen once every X number of years and is sort of random as to when it occurs. I think there would be some value to having an institutionalized practice where this dialogue could occur in a more formal,

structured way.

So, in conclusion, I would say that really we need to spur action on problems of concern to the judiciary. That's really, I think, the source of the problems that we are having, and we need to find some mechanism for doing that.

Now, this is just one suggestion on how one might do this. There are certainly lots of others. But I think that it's fair to say that neglect is just as pernicious as an affirmative act to injure an independent judiciary. And I think that's one of the topics that I hope will be out there on the table for the rest of the discussions today.

So thank you very much for your attention.

(Applause)

I gather there might be some time for questions, if there are any, or we could just take a longer break.

MAGISTRATE JUDGE BAKER: I have a question for you, Professor. What do you think the chances are that the Chief Justice would think that's a good idea?

(Laughter)

PROFESSOR MAGLIOCCA: Well, I don't know. And I suspect that nobody much likes going before Congress to be grilled in a hearing. I doubt that the Federal Reserve chairman sort of skips up the Capitol steps when he has to do this.

The question is: Is this a useful solution to the problems that are out there? I don't know. The Chief Justice was a big hit when he went through his confirmation hearings, so perhaps he would be more inclined to do it than most. I don't know. Obviously that's a tough question, and I think one would have to be persuaded of the merits of the process to say, in effect, "Okay, I'm going to submit myself to something which would be time consuming and wouldn't really be a whole lot of fun."

Nevertheless, I think that that's not really the controlling question. The question is sort of, well, he's the head of the Judicial Conference and that gives him certain responsibilities to act on behalf of his colleagues in the federal judiciary, and there may be other ways to do that that are better, but I think something should be done in this respect.

PROFESSOR GROVE: Are there any risks here that you can imagine?

PROFESSOR MAGLIOCCA: Well, I think so. I think certainly since it would be—well, I think one potential risk would be the conflict-of-interest risk that I mentioned.

Now, another risk would be, do you think, that there are, in fact, common concerns among the federal judiciary? Some people might argue, look, the federal judiciary is a very diverse body with lots of different opinions about issues. Is it really the case that you'd be presenting a consensus position, or is it the case that you'd just be presenting the Chief Justice's position on various matters? And I think that's something in which great care would have to be exercised. It's easy to identify some core issues like higher salaries that probably would get a consensus. But, yes, I think there would have to be great care exercised to make sure this doesn't just become a vehicle for the Chief Justice to express his personal views about what ought to be done with the federal

courts.

I guess the only other risk I can think of would be the extent to which members of Congress would focus their questions on the Supreme Court rather than on the purpose of this hearing, which would be about what's going on in the district courts and the circuit courts. I mean, I don't know that I would say, well, you can't ask the Chief Justice about something related to the Supreme Court, but I would hope that in setting this up everyone would understand that, look, the point of this is to help out the folks who really need the help, namely, circuit judges and district judges. But that's a problem which hopefully one could deal with just through sort of informal discussion. I mean, all of this, obviously, would have to be constructed through informal discussion since it can't be required by Congress.

Yeah, Henry.

PROFESSOR KARLSON: One of the concerns I have is traditionally courts have tried to be in the background. In other words, not use a bully pulpit which is traditionally the political arm of government.

Isn't there a risk that this could involve, at least in the minds of the public, more in the political process and thereby in the minds of the public, lose some of their independence and, in fact, their credibility?

PROFESSOR MAGLIOCCA: Well, I think that that problem is out there. But if it's focused on the kinds of issues that typically arise in circuit and district courts, I don't think it's a problem because it's not going to deal with the more controversial topics that are going to sort of engage the credibility problem in the way that you're describing. At least, you know, that would be my hope as to how it would be framed. I mean, there is some risk of what you're talking about.

PROFESSOR KARLSON: What I am really talking about here is not how it will start, but how it will end, the evolutionary process in which this will become more and more a bully pulpit over the period of time and again making the court more and more political in the minds of the public.

PROFESSOR MAGLIOCCA: Right. Well, keep in mind that this would be the Chief Justice acting in his capacity as head of the Judicial Conference and talking about matters that are not at the Supreme Court level.

Now, it is true that judicial lobbying presents problems, partly for conflict-of-interest reasons, partly because we want judges to not be taking the lead on policy issues. On the other hand, there are a number of precedents for judicial lobbying with respect to getting the Supreme Court certiorari jurisdiction; for example, they lobbied for that. The bankruptcy, the creation of the bankruptcy courts, was something which Chief Justice Berger was very interested in.

So, I think it's more a question of what issues are going to be involved. And I think that there would have to be sort of, in effect, an understanding that certain issues would not be drawn in, for example, things that the Supreme Court are doing, things that are really more a focus there than a focus in the lower courts.

So it is a risk that would have to be taken into account.

Yes.

PROFESSOR GROVE: We all know that good, institutional relations are sometimes based in part on good personal relations and relationships. The idea of bringing the Chief together with members of Congress, in maybe a cozy sort

of setting, is a good idea. And I think in that respect your proposal has a lot of appeal.

My concern is will it be possible to really distinguish between the Chief's role as the Chief Justice and, on the other hand, as the head of the Judicial Conference?

And also, I wonder whether this could be the occasion for differences between the branches simply to be publicly flogged.

PROFESSOR MAGLIOCCA: Right. Well, I suppose the question is: What do you think promotes relations better, open discussion or each side more or less shouting at each other through other means? I tend to view the solution as being more about putting the issues out there and discussing them. That may be naive, but I suppose I do come down on that side.

Now, it is true, as you say, that, well, this might bring to the fore certain differences or heighten tensions—some senator browbeats somebody, that sort of thing. But I think overall it has been an effective model with respect to the Fed. And, granted, there are different concerns. There are concerns, for example, to go back to Professor Karlson's point that the Federal Reserve chairman might act as a lobbyist for certain economic policies or political views, and that sometimes was expressed, you know, when Greenspan was the chairman. But I think it's been pretty successful there, and I think it can be pretty successful here.

Certainly it's possible you could have a more informal model. Maybe rather than having an open hearing, you have a closed hearing; or rather than having a hearing, you have a kind of get-together of some kind. That could work, too. Although, I do worry that that sort of thing might not have the public punch that a hearing would have.

But that's an interesting point. I think 9:20 is the time we have to stop. So, thank you very much.

(Applause)

DEAN ROBERTS: One of the things I was thinking about as Gerard was speaking is if there's any group whose voices are heard less than federal judges, it's law professors. So, I'm hoping that somebody is paying attention to what you have to say, Gerard.

We have to take a break, and I'm told we're going to stay on schedule, so it's got to be a ten-minute break. We'll be back right at 9:30.

(A recess was taken.)

THE VIEW FROM THE CAPITOL

Panelists: U.S. Representatives Mike Pence, Baron Hill, Brad Ellsworth

PROFESSOR GROVE: Good morning. Welcome again to everyone, especially Mr. Justice Alito who is here in chambers and will be coming in anytime now.

Let me begin this part of the program by introducing the members of our panel and myself. I'm probably the only one who actually needs an introduction. I'm Jeff Grove. I'm on the law faculty here at IU Law in Indianapolis.

With us today are three United States Representatives. I'm going to do this in order of seniority. First of all, Honorable Mike Pence, who is a graduate of our Law School. He's a fourth-term congressman representing Indiana's Sixth Congressional District in eastern Indiana. He is a self-described Christian, conservative, and Republican, in that order. He's a member of two very important House committees, the Foreign Affairs Committee and the Judiciary Committee, which I think will stand him in good stead today.

He's also emerged not only as an influential leader in his own party, but also has led some important bipartisan efforts. I'm thinking in particular about his spearheading bipartisan support for the federal shield law for journalists. In a brief exchange we had this morning, I understand that that is moving forward in the Senate, being marked up. It may actually make headway.

Anything you'd like to add to that?

CONGRESSMAN PENCE: Next week, maybe for consideration next week.

PROFESSOR GROVE: Congratulations for that.

Honorable Baron Hill, who was first elected to Congress in 1998. He served three consecutive terms, took a hiatus, and is back now serving his fourth term. He is a Blue Dog Democrat, which is described on his website as a coalition of moderate to conservative Democrats who seek common-sense solutions, strongly advocate fiscal discipline.

He represents Indiana's Ninth in southern and southeastern Indiana. Serves on the House Energy and Commerce Committee and the Science and Technology Committee.

Baron, welcome.

And finally, Honorable Brad Ellsworth, a first-term Democrat, also a member of the Blue Dog coalition, represents Indiana's Eighth Congressional District, sometimes known as the "Bloody Eighth."

(Laughter)

He serves on the House Agricultural Committee, Small Business Committee, and Armed Services Committee. And he was named a little while ago by a newspaper in Washington called The Hill.

CONGRESSMAN ELLSWORTH: I've got to go.

(Laughter)

PROFESSOR GROVE: He was named—actually, I mentioned this to his staff and said I understand Brad was named as one of the fifty most beautiful people—

(Laughter)

CONGRESSMAN ELLSWORTH: Have a big heart.

PROFESSOR GROVE: —on the Hill and I was quickly corrected, no, he is the first of the fifty most beautiful.

(Laughter)

PROFESSOR GROVE: But that follows his—

CONGRESSMAN ELLSWORTH: Obviously, it's not true. Look at my—

(Laughter)

PROFESSOR GROVE: I believe this is the prettiest panel.

(Laughter and applause)

You know, before that Brad was known as "Sheriff Dreamy" down in Vanderbilt County.

(Laughter)

CONGRESSMAN ELLSWORTH: That wasn't on my website, was it?

(Laughter)

PROFESSOR GROVE: It's not. But if you go to his website, you'll find many links to his photographs.

(Laughter)

CONGRESSMAN ELLSWORTH: Let's get on with the panel.

(Laughter)

PROFESSOR GROVE: You're a good sport. Thank you for coming here today.

I said in the materials that I prepared to have distributed that each of these congressmen represents more than a quarter of a million people. That's technically correct, although it's probably more like 500,00 or 600,000 people these days. I'm still working back in the last century, and I need to get this updated. So, more than a half million Hoosiers are represented by each of the congressmen who are with us today.

Thank you for coming. We really appreciate it.

Senator Lugar was in discussion with Tim Baker and some others about the possibility of coming today. It didn't pan out, but he did send a very nice letter, which I think is in your materials, but I promised I would read out and I'd like to do that.

> Dear Conference Attendees: It is my pleasure to welcome you to the Conference on Relations Between Congress and the Federal Judiciary being hosted by Indiana University School of Law, Indianapolis. I'm especially pleased Justice Samuel Alito and former Senator and U.S. Ambassador Dan Coats, along with other notable judiciary representatives from Indiana are attending the Conference.
>
> A strong and vibrant judiciary is essential at all levels of government and today's event enhances the dialogue that is so valuable in maintaining our strong institutions. I commend the Indiana State Bar Association for sponsoring this event and bringing you all together.
>
> I regret I'm unable to attend this most important gathering but extend my best wishes to everyone in attendance.[7]

I think before turning to our panel, and really my job here today is to try to promote some discussion and moderate that discussion, that maybe I will just say a couple of things by way of introduction. Again, some of this, I think, is in the materials you received.

It's very clear that the allocation and balance of powers between Congress and the federal courts is a key component of the constitutional structure of our national government. The powers vested in Congress affect the judiciary in a

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7. Letter from Richard Lugar, U.S. Senator, Indiana, to Conference on Relations Between Congress and the Federal Courts Attendees (Sept. 14, 2007) (on file with Indiana Law Review).

variety of ways. Federal judges come into their robes only if the presidential nomination is confirmed in the Senate.

Congress retains ultimate authority within constitutional limits for regulating the subject matter jurisdiction of the federal courts, the business of the federal courts. I think that's not a terribly controversial proposition, though I think it's more clearly true with respect to the—Gerard didn't want to say lower federal courts, and I don't want to say inferior federal courts, it's just the way it's described in Article III, right?

CHIEF JUDGE McKINNEY: Exactly.

PROFESSOR GROVE: But I think it's clear that Congress has the ability to expand and contract, within constitutional limits, the subject matter of the federal courts, certainly in the lower federal courts; and there's also some opportunity for regulating the Supreme Court's appellate jurisdiction, although it seems to me this is a much stickier area.

Congress decides how many judgeships will be created, determines the number of Supreme Court Justices, which has ranged anywhere from six to nine over time. The federal judiciary looks to Congress to appropriate money, if the finances work, to create judgeships, to pay salaries for courthouse facilities, and to provide funds for all manner of systemic activities that take place in the judicial branch.

At the same time, Article III judges enjoy guarantees of life tenure on good behavior and, short of impeachment, are also guaranteed compensation which shall not be diminished during continuation in office. Although, the appropriate levels of judicial pay remain, maybe controversial, but certainly widely discussed.

We know that federal courts and ultimately the Supreme Court exercise the power of judicial review of the constitutionality of legislative enactments. And, you know, this is a very dramatic role. It's sometimes been characterized as counter-majoritarian. I mentioned in the materials that Professor Bikel—I misspelled that but I have it right in my notes here—called judicial review a deviant institution. On the other hand, I think it's often hailed as crucial protection for minority rights. But it's still controversial, and I think that various jurisdiction stripping proposals, that I hope we can talk about, will attest to that.

Finally, we know that the work of the federal courts also implicates the structure of our federal system in the relationship between the national tripartite government and the various state governments. And clearly, both Congress and the federal courts have the responsibility within the ambit of their respective powers and their prudential deployment of those powers to do what they can to protect the federal system that's in place.

So, with that said, let me raise a couple of questions with the panel. I'd like to start with a couple of fairly broad questions. I hope they're not too broad. If they are, I hope you'll tell me.

It's been almost 220 years since 1789, and in that time the Supreme Court has invalidated 160 congressional statutes in whole or in part. But forty of these statutes were struck down in a recent period of only twenty years, 1981 to 2000, and this is a trend that has continued pace. From what I could ascertain, it appears that in the last twenty-five years or so, judicial invalidation of

congressional statutes has reached something like a high-water mark.

So, I guess the question is: What explains this phenomenon? I mean, has Congress become insufficiently attentive to its own responsibility to try to take the constitutional measure of legislation it enacts, or are the federal courts overreaching in their role of judicial review, or can this be explained in some other way?

Gentlemen?

CONGRESSMAN HILL: Want me to start? First of all, thank you for the invitation to appear before you. It's a humbling experience for me to look out in this crowd and see people I've known for a long time, including my worthy opponent, Ambassador Coats. It's very nice to see you.

But as I look out, I see Judge Stanton, Judge Young, Judge Barker, Justices Shepard and Boehm and Sullivan. And Justice Alito, it's very nice to have you where God himself was born, in Indiana.

(Laughter)

But, your question, it was the most difficult question on the list of questions that you had for me to answer. I don't have as clear an answer to that question as I do to some of the other questions that you had.

I did take the time to do some research and find out what statutes have been overturned by the Supreme Court in the last twenty years and to see if there was some kind of pattern. But I saw no pattern whatsoever. It was statutes concerning Indian tribes, casinos, civil rights issues. So, my answer is I have no answer as to why that is happening. You all, because you're involved in the legal profession, probably have better suggestions to offer than I would have.

But if I would make a guess, it would be an empty guess. I can't conjecture because from the cases that I looked at or the statutes that I looked at, there was no clear pattern as to why this was occurring. So, I don't have an answer to it.

PROFESSOR GROVE: Mike, do you have a comment?

CONGRESSMAN PENCE: Yes. Thank you, and thank you, Professor Grove, thank you for inviting me back to my alma mater. Although we didn't have any rooms this cool.

(Laughter)

The place across the street was a dump.

(Laughter)

Some of you went there, I know. No, it wasn't, I'm just kidding.

It's wonderful to be home. In particular, as Baron just said poignantly, to be among so many jurists who I respect so deeply. Our Chief Justice and Justice Alito, it's good to see you again. And the supreme source of law and authority, Judge Barker is here.

(Laughter)

So, I'm really very humbled to be here, but will try to be candid and straightforward about some impressions.

I think there has been a growing distance, Professor Grove, between the two buildings, the Capitol building and the Supreme Court building in the last forty-some-odd years. We evicted the Supreme Court somewhere around the turn of the century across the street, and it seems like things have not gone well. When we were the landlord, it seems like we all got along well and worked things out.

But there's some truth to that. There's just some truth that there's some distance. Justice Alito would attest to this, but I see this almost great chasm in that little street that separates the Capitol. There's not a lot of interaction. Justice Alito and Justice Breyer came to the Judiciary Committee not long ago on an issue we may talk about today, but it was a marvelous discussion.

Actually, I think I said in the hearing that I thought the tape of this ought to be played in every civics class and every eighth grade government class in the country because it was such a wonderful interplay between the people's representatives in the judicial branch and the people's representatives in the legislative branch. It was a dynamic discussion and respectful, but it just doesn't happen that often. There's just not a great deal of interaction.

So, some of the incoherence of that, I think Baron accurately observes, is I don't think there is consistent communication. I know in the legislative process, some issues we've been working on—one I've been working on, issues like the Media Shield Bill[8] or trying to find a way to give residents of the District of Columbia a representative in Congress—you find yourself trying to more read the tea leaves in the process as opposed to anything even remotely akin to the informal communications that animate much of the national government.

I will say just to start the ball rolling, I was at the Supreme Court on Monday and saw the great John Marshall statue in the basement, chiseled on the wall with a quote that says something like, "It is the role of the Court to say what the law is." And I read that and was inspired as an American, and then I thought that's kind of our job.

(Laughter)

That may be the—

(Laughter)

That may be the whole problem.

Wrong.

(Laughter)

So I think there's a tension there, and we can elaborate on it. I really do think with some of the decisions in the 1960s, the Supreme Court reached into the classrooms of every jurisdiction in America and said our school children couldn't bow their heads and pray for God's blessing on their teachers and their parents.[9] The Supreme Court in 1973 struck down the hard-fought, hard-passed laws prohibiting abortion in every jurisdiction in America,[10] upending what Susan B. Anthony and others had begun as a political and legislative process a century earlier with one fell stroke.

There's been a litany of decisions that have created a greater tension between the two branches of government, and it's been some of that tension, and the attendant separation I think, that may account for that rise.

CONGRESSMAN ELLSWORTH: Thank you. As a freshman member, you have to excuse things like that. I'm still flustered from the introduction.

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8. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007).
9. Roe v. Wade, 410 U.S. 113, 116 (1973).
10. Engel v. Vitale, 370 U.S. 421 (1962).

(Laughter)

I was trying to think, I guess, there were worse lists in Washington, D.C. I could have been on.

(Laughter)

I think you know what I am talking about.

(Laughter)

I'm really glad that I was here for the first presenter. I was going to bring up the raises and be in all favor until I heard Congress was inactive and neglectful. Now forget that raise.

(Laughter)

It's also good to be here with the Justice and Mr. Shepard. Thank you, Ambassador, and Judge Young from Evansville, a long-time friend who we run with quite regularly.

I think we're all a product of our upbringing, of our surroundings, what we do. I was in law enforcement for twenty-five years, brought up in a career that taught me to respect the judicial branch and to comply and abide by what they did. I didn't always agree with the judge's decision, but it always made me want to do my job better the next time so that the judge or the jury would agree with me. I think that's the driving force.

I'm not as overly concerned with the trend that you bring up. I think it's healthy. I think it shows that the branches are separate and do work and that the check and balance is there. I think a lot of us in Congress are driven by what we hear from the folks at home. We are out there, and, with no disrespect, I know some judges in the room have to run for their office and some do not, but I would say that Mike, Baron, and myself go out among the people holding town halls, sitting in grocery stores at a card table, inviting the people to come up and say what they want us to do.

So, they're not constitutional experts; I sure don't claim to be a constitutional expert or scholar. We try; we do our best to comply, and certainly you don't want to embarrass yourself by going against the Constitution. But we're also driven; when you run for office every two years, you're driven by those people in the grocery store and those people in the town hall that come up to you everywhere and tell you you ought to do this or you ought to do this, why isn't there a law for this? And if you want to keep your job, that sometimes drives what you do and what you propose and what you legislate.

Like I said, I think we want to keep in line with what the Constitution says, but there's also that if I'm wrong, the Supreme Court will tell us, or the district court, or whoever it might be. So, I try to do things that the people want me to do, that I feel the majority of the folks sometimes will think, and then what my heart allows me to do, or my common sense, if there is any, and that's what drives me.

So, it is different—but I'm encouraged by the system that it is a check and balance, and it will vet itself out.

PROFESSOR GROVE: I agree with you, Baron and Mike, it's not easy to detect a clear pattern in the last twenty or twenty-five years. I do think the Supreme Court's Eleventh Amendment has certainly had an effect here, essentially enlarging, some might say, the immunity of states to sue in federal

courts. Of course, the vision that the federal courts have of Congress's constitutional powers under the Fourteenth Amendment, I think, has also undergone some rethinking and maybe some revision. But beyond that, I think it would be hard to nail that down.

A related question I wanted to raise has to do with the role of the federal courts vis-a-vis state and local governments. Many here today will recall that Judge S. Hugh Dillin of the Southern District of Indiana had an order in place for more than thirty years before it was dissolved having to do with the busing of school children in the Indianapolis area for purposes of achieving racial balance. In that sense, Judge Dillin was asserting some very important control over local schools and school policy. The estimable Judge Sara Evans Barker, who is here today, having found that conditions and overpopulation of the Marion County Jail had become constitutionally impermissible, had an order in place for some time bringing judicial oversight to the jail and, in fact, from time to time ordered that there be a discharge of prisoners in order to bring the population within constitutional limits.

So, I suppose my question here—and again, it's been very broad, and we'll try to get it a little more specific—are these so-called, we call them sometimes institutional remedies because they're remedies that are designed to affect public institutions, state and local institutions. Are the federal courts exceeding the authority they have or should have when they invoke these kinds of institutional remedies?

CONGRESSMAN HILL: I guess we have an order here, don't we?

I don't think I have any means or reasons why I'm ever going to be in Judge Barker's court, but I do want to answer this question the best I can in case I do get in her court.

(Laughter)

Ironically, decisions to decrease the prison population and the busing issue are issues that I agree with. Whether or not they should have had a judicial remedy is a question mark for me.

If I am Brad Ellsworth, and I'm the sheriff down in Vanderburgh County, and I have control over my prison population, I don't think I'm going to be very happy when I have a federal judge order me to release some of those prisoners.

So, the question becomes: Is this a judicial remedy, or should it be a political remedy? I happen to believe it ought to be a political remedy. Because in the final analysis, whatever Brad Ellsworth decides to do, he's going to be held accountable by the people.

As judges, who basically don't have to face reelection, not being held accountable, they can make decisions in the interest of good justice, which is probably the right thing to do. I'm not sure that that authority ought to be transferred to unelected people. I think ultimately that the Brad Ellsworths of the world need to be held accountable for the decisions that they make and that they have jurisdiction over.

So I'm at odds here with some of the decisions that have been made at the judicial level.

CONGRESSMAN ELLSWORTH: Thank you, Baron.

I can remember vividly, and Judge Barker and I just talked about this before

the panel started, about how closely in Vanderburgh County, as the sheriff, we watched the decisions that were going on with the Marion County jail, very concerned about what happened.

Coming up in law enforcement, again, you were very close to the people and the phone calls about what was going on and do you release, are we releasing, too many. We were in a very overcrowded position, too.

What I was more concerned with was that, of course I didn't want the responsibility of saying I'm going to let these people out, then it's all on my back. So, having a judge say you have to cap it at 329, or whatever the number is, was helpful, because then I could say it was just that federal judge, see, that bad person.

(Laughter)

They're the ones that let the rapist out and the burglar out that then broke into your home.

What we were very concerned with down there—and you also have to relate that to the county commission, the county council—were any unfunded mandates. I think we got more nervous about where the money was coming from in a county that was losing its tax base or staying at least level on tax base. And then to be told you have to add—and I'm just making numbers up—thirty-five new people, take on that payroll, or we're going to order you in the next two years to build a county jail at $35 million. That's pretty tough.

We were very fortunate in Vanderburgh County; everybody was working together. We had a federal lawsuit and working closely with our federal judge and the courts, a very understanding judge that knew the predicament there.

So, I look at that; it makes you very nervous. But, again, it is that check-and-balance system. The Constitution fairly doles that out—the responsibility—to the federal judges to oversee and look over what we do. And again, I applaud the check-and-balance system. Like I said, I wasn't always in agreement with every decision, but we learn to comply.

PROFESSOR GROVE: Judge Barker, I know you'll be on a panel this afternoon—

JUDGE BARKER: Just you wait.

(Laughter)

PROFESSOR GROVE: That's why I wanted to say, of course; you're entitled to equal time immediately if you want.

JUDGE BARKER: I'd rather hear from the representatives.

CONGRESSMAN PENCE: As I said, I think Baron is being way too conservative on this.

(Laughter)

I do have a real concern, as I said in my first response, about the tendency—and not this case in particular—of the federal bench to engage in what, in effect, ought to be decided at the political arms of the federal government.

Now, I will tell you that it does seem to me, compared to what the Constitution says about cruel and unusual punishment, that there is a unique burden that the courts have to ensure that the people that are incarcerated by the state are afforded treatment and care. There seems to be this special issue there

that is certainly debatable.

What is not debatable to me was the federal court out west, I think it was in Kansas City, that ordered the City to raise taxes to spend more money on local schools.[11] This was a decision some five or seven years ago, which to me was just—it is preemptive action by the federal court over the school board, over the county council, over the state legislature, over everyone that's involved in developing the funding stream for local schools. It ought not to supplant the ordinary and sometimes excruciatingly slow process of developing public will behind those things.

I think in that school district, if memory serves, it was almost a doubling of per-pupil spending that was ordered. SATs have since gone down in that jurisdiction. So, I think we—I think, you know, where there are rights of individuals protecting the rights of persons within the United States of America and the protection of the Constitution, the court is within its purview. But where the court is coming in and supplanting its judgment for the judgment of people at the township, county, state, or federal level, to be deciding how assets are distributed, I think that there should be much more restraint than has been shown in many jurisdictions around the country in recent years.

CONGRESSMAN ELLSWORTH: Just one more thing so I don't get accused of kissing up too much: I can remember as an elected sheriff and wanting to be elected again, when questions like this would come up about cases in particular; and you have three or four news stations and six or seven radio stations that have mics in your face; and when you don't comment, then it's with that sarcastic tone, "unavailable for comment," or whatever it was. I know it was always kind of a burr under the saddle when the judges could say, "I can't talk about that because I can't speak in regards to a case."

So, when they made a decision for something—I'm not even sure this happened in Vanderburgh County—but I always said, "Why do they not have to answer to their decision to let these people out and go in front of the cameras? I have to and they don't." So I heard that comment a lot or a lot of criticism or at least complaints in that arena.

So, it was always a concern to us I'm the one having to explain these decisions. I might say that I don't like them, I don't agree with it, but the judge wouldn't have to go on TV and explain why they made that call.

Sorry, Judges.

PROFESSOR GROVE: I think I detect some general agreement among the panel with respect to these matters that we've just been talking about, at least with respect to the responsibility of the elected officials to keep track of what constituents want and they are entitled to have. On the other side, the federal judges are exercising their powers in ways they deem appropriate. It seems to me this is the kind of tension that can never be washed away completely. It's sort of inherent in the system we have.

I would like to ask more specifically about a proposal that my colleague, Gerard Magliocca, made earlier today. I know you were here, Brad. And I'm not

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11. Missouri v. Jenkins, 495 U.S. 33, 50-58 (1990).

sure when you came in, but Gerard took the long view and I think suggested that maybe tensions between the branches are not as serious now as some believe, and historically that may be true. I think not everyone is that sanguine about it. I think there is very real concern about whether relations do need to be improved and how to do that.

Gerard's suggestion was that the Chief Justice be invited to appear before Congress on a regular basis—not in his capacity as the Chief Justice, but as the head of the Judicial Conference—and create an opportunity for dialogue between the branches in this way. I just wonder if any of you has a thought about whether that seems like a good idea.

CONGRESSMAN PENCE: Well, as long as we do it like Tony Blair does it in the Parliament—

(Laughter)

—no holds barred.

(Laughter)

I think that would be very constructive within certain parameters. I do think that the dignity that ought to attend the federal bench does not lend itself to the wide-open, sharp elbows that we all enjoy in Congress and in most hearing settings.

But I do think, for instance, the Chief Justice's annual report—you know, there was a time that the State of the Union was just tendered in paper to the Congress and somewhere, the historians would know, the President started coming down the street and making a speech.

I had the occasion to visit with our Chief Justice, who is a Hoosier, Justice Alito—

(Laughter)

—and had a very warm conversation about issues, one issue we may talk about today. That particularly was an issue he focused, I think, the entirety of his annual report on. I would venture if we surveyed members of Congress, including the Judiciary Committee, and gave them a pop quiz about what the Chief Justice of the Supreme Court's annual report focused on, nine out of ten would fail the quiz.

So, creating a setting where the Chief Justice could present to the Congress, I think, might be a very intriguing way to start that dialogue. There's just something—I don't know, maybe all three of us are from south of Highway 40—something Brad said resonated with me, just a certain deference to the court: I would be a little hesitant about putting the Chief Justice of the Supreme Court on the grill before a committee like a confirmation hearing. It seems to me that would not be in the public interest, but increasing the flow on an annual basis back to Congress would naturally create a certain dialogue in and of itself that I don't think exists today.

CONGRESSMAN ELLSWORTH: I think, first, we have to ask—this was probably my favorite question that they proposed—what we hope to achieve by this. As a new member of Congress, I don't think you—and I'm not accusing these two of this at all, there's that inside-the-beltway mentality that after seven months I've seen, you know, what goes on in these hearings. And you all have watched it over the last several days with General Petraeus, but thanks to C-Span,

you see it every night—or hopefully you don't.

(Laughter)

I think it's extremely important—goes back to the first question—to keep the judiciary out of the political fray. And I've got to be honest, my interpretation of Washington is there's a lot of political fray.

You've seen the hearings on TV when they have a guest or a witness that comes up there. Like I said, I'll go back to General Petraeus most recent because I think everybody watched that. As they moved around the tables at the House and the Senate, both sides of the aisle, I'm extremely bipartisan, non-partisan here, most members took the entire—they've got the five-minute rule, and that is supposed to be your question and the answer in a period of five minutes in fairness to all members. As everybody witnesses, usually the member talks for about four minutes and forty-five seconds about his position, either bashing the witness or telling what his position is already, and then leaves sometimes fifteen seconds for the question and then submits it for the record or gives them a chance, and they usually go over. That occurs in almost—well, every hearing I've been in so far.

So I think honestly doing this, what we're doing here today, doesn't have to be the Chief Justice. It could be people, you know, federal judges that agree to get together, local judges that agree. You all know the issues we're talking about; we've got the list in front of us. Let's discuss it; let's have an interaction back and forth. It doesn't have to be in front of a C-Span camera. I see we're taking notes here; that it's on the record. That's okay. But less formal where we can sit down, you don't have a little red light in front of you that says you have only five minutes to get your position out, and do it that way.

I make my decisions a lot of different ways. The war in Iraq, I talked to a troop at the Yellow Tavern in New Harmony a couple weeks ago and then last week flew to Iraq and talked to Iraqi generals and listened to General Petraeus. You take it all in to make a decision so many different ways. I find this for me more helpful than a congressional hearing and what some would call a dog and pony show, which is what a lot of the hearings turn out to be.

CONGRESSMAN HILL: I think I would echo what Brad and Mike have said. I don't think it's a bad idea to carry on a dialogue with the Chief Justice and Congress. I guess it depends on how it's structured.

I mean, if we're going to make the Chief Justice take an oath and all that sort of thing, grill him, that's not a good idea. Communication is a good idea. But if Congress is going to be on a witch hunt with what the judiciary is doing, I think that's a bad idea.

In Indiana we have the State of the Judiciary. I've listened to Justice Shepard give many of those when I was in the legislature, and I think that's a good idea. Maybe it's something that we could think about at the federal level, that there be a State of the Judiciary in addition to the State of the Union address.

So dialogue is important. But as it relates to oversight of the executive branch, there is precedent for this. Both the White House and the legislative branch are in a political environment. Because of the President, I think it's appropriate that Congress have oversight of what the executive branch is doing, but I wouldn't extend that to the judiciary. If there's wrongdoing going on within

the judiciary, we have a process called impeachment to take care of those kinds of things.

PROFESSOR GROVE: Thank you for saying that. Actually, that does come to a matter I wanted to ask about. Maybe now is the time to do it.

As you say, Baron, we're aware of many recent efforts by the Congress to exercise oversight over the executive branch. I'm thinking about congressional reaction to controversies such as the firing of a number of U.S. Attorneys by former Attorney General Gonzales, executive authorization of terrorist surveillance programs, and the attempts Congress has made to bring executive department officials before Congress, if necessary to issue subpoenas, to hold out the threat of contempt.

The question, I guess, is whether there's any reason that Congress can't conduct oversight hearings of the judicial branch. I take it from your last comment, Baron, you would worry about that, wouldn't think that would be appropriate. But what do others think about that—the idea of hailing federal judges before a congressional committee and trying to find out, for example, why are you refusing to pay heed to congressional intent? Does this make any sense at all or doesn't it?

Mike, do you have a thought about that?

CONGRESSMAN PENCE: I just have a reaction. I think—I hope there's no reporters in the room to see how often I agree with Baron Hill.

(Laughter)

Brooks is here.

(Laughter)

All kidding aside, I have some hesitation about doing that. We have very clear powers in the Constitution for impeachment. If there's cause, we can initiate in the Congress the removal of a judge. But I think, for me, the proper role for the Congress is to be as assertive on the jurisdictional issues before the fact than to be reconsidering decisions—to essentially put ourselves into the judicial branch as a new court of appeals, which is I think what we would be doing if we would be taking action that would be just as extra-constitutional as, what I accuse the judiciary of doing, reaching into the legislative process.

I don't think we should be a court of appeals, but I do think—and I've co-authored legislation to use clear constitutional power—that Congress has to limit the scope of jurisdiction of the courts relative to subject matter. In that case I think that's perfectly appropriate. That's before the fact. And it would give guidance to courts, particularly in areas that I co-authored, what we called the Constitution Restoration Act,[12] which took a run at essentially saying that the courts would not have jurisdiction where a public official or public entity's acknowledgment of God was the case in controversy.

I will say to you, without going on a tear here for sixty seconds, I think the greatest threat to the judiciary in the twenty-first century is a public perception of elitism. All people have to do is take a vacation in Washington, D.C. and see the Ten Commandments displayed in the Supreme Court, a bust of Moses in the

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12. S. 520, 109th Cong. (2005).

House of Representatives, to see the Supreme Court open in prayer, to see the Congress open in prayer, and then to realize in Winchester, Indiana, you can't do those things because of decisions by the federal courts.

I would say with deep and profound respect, and I see no one in this room that I don't respect, that I think that kind of elitism will tear at the fabric of the credibility of the judiciary in the long-term. By elitism, I mean whenever the people see people in power saying we can endure exposure to certain things that you cannot be permitted to be exposed to, namely the acknowledgment of God in the public square even in a way that reflects the accommodations tradition pre-1960s in Supreme Court cases.

I just can't help but feel that using the Congress, not reviewing court cases and becoming another court of appeals, but on the front end saying to the court, "Look, we are a nation whose institutions presuppose a Supreme Being, our founding documents refer to a Creator, capital C, and all the previously referenced acknowledgments indicate that we simply do not want the federal courts reviewing in cases and controversies where the acknowledgment of God is the subject." I think that would go a long way toward defeating a widening sense of that elitism, and I think that would be important.

PROFESSOR GROVE: All right. Let's talk about that subject for a few moments, congressional efforts to strip the federal courts of jurisdiction. Incidentally, that idea that I floated about the congressional oversight hearings for the judiciary—that's not something I'm proposing, just an idea I wanted to put out there for discussion.

These jurisdiction-stripping bills, some of them have different twists. I'm not going to go through the list of bills that are contained in your materials, but just say a couple of things more generally about them and then invite a little discussion.

Three of these bills—Sanctity of Life Act,[13] We the People Act,[14] Public Prayer Protection Act[15]—provide that any decision by the federal courts in cases wherein the jurisdiction has been removed would also treat decisions by the federal courts as non-precedential. I assume preexisting precedent would no longer be binding according to the provisions, at least in these three bills.

That is to say if the courts decide to act in the areas where jurisdiction has been withdrawn, their actions will not carry force of precedent; presumably preexisting precedence would not be binding. In fact, one of these bills, the We the People Act, threatens impeachment of federal judges if they were to attempt to exercise jurisdiction in an area that has been removed by federal statute.

It seems to me that these bills seek to counter the familiar principle that federal courts do have jurisdiction to determine whether they have jurisdiction. And I think threats of judicial impeachment really, really do raise the stakes here. This may not—I don't know if you would be willing to go that far, Mike.

It is true that some of these bills have made progress. They've been passed

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13. H.R. 776, 109th Cong. (2005).
14. H.R. 300, 110th Cong. (2007).
15. H.R. 4364, 109th Cong. (2005).

in the House, some by a significant majority. So, they have not been taken up by the Senate. Who knows what will happen next. But I guess the question is, you know, what is there to be said about these congressional efforts to strip the federal court subject matter jurisdiction in certain cases or categories of cases?

I take it, Mike, your comment certainly addressed that. Is there anything more you would like to say or other members of the panel? Does Congress have the power to do that? Assuming it does, is it a good idea? And maybe more important, what is driving this?

CONGRESSMAN PENCE: Let me, with the indulgence of my two colleagues, maybe just let them ponder that question for a few more seconds.

On the subject of impeachment—there's a lot of hot rhetoric that comes in these bills—I don't recall endorsing efforts to look backwards in the law and prohibit or threaten impeachment. I don't think that's altogether constructive.

I will say that this business of the courts having the power to determine the jurisdiction that they have—that's not entirely what the Constitution says. It says that the Congress sets the jurisdiction of the federal courts. There's express language in the Constitution that we have the power to do that. In fact, it's actually very routine that we do that.

In my seven years in Congress, and Baron knows because he's actually arrived in Congress a few more years than I did, earlier than I did, we very routinely will pass legislation, the tail end of which will include a whole range of descriptions of what the courts have jurisdiction over and what they don't. My way of thinking, it's never been subject to court challenge, never even been a subject of controversy. The Congress very routinely passes legislation exercising their authority to set the jurisdiction of the courts.

The larger issue is, to me, and maybe I'm just making more of a plaintiff cry to a lot of you who are in positions of great responsibility and some of you who will be before you know it, and this is a bond that we three share, a bond of faith, a bond of common traditions, we splice them a little bit differently some days when we vote, but there's no difference in the core values, belief in the importance of faith in God and family and really what makes our close relationships possible. There is a sense among millions of Americans that the courts have been attempting to eradicate any acknowledgment of God from the public square on just kind of a consistent basis over the last thirty and forty years. And that flies in the face of that accommodation as tradition in the Supreme Court for years and years and years where the public square was open, open to all faiths, no faith.

But the sense that the freedom of religion has been interpreted by the courts to be an enforced freedom from religion is deeply offensive to millions and millions of Americans, and I believe if there is going to be some counter reaction to that. I would prefer that it came from the court. I would prefer that at some point in the not-distant future the court reaffirm in some powerful and plenary way an accommodations doctrine for the twenty-first century and recognize the importance of the acknowledgment of faith in the public square and that we weren't flipping microphones off when the graduation speaker at a high school graduation begins to talk about her faith in Jesus Christ, which actually happened

because the school was so fearful that they would be violating federal law and court decisions.[16]

So I really have a sense that the public is growing more and more weary of that and my hope is that the court will address that. But I'll continue to be a part of efforts in the political side of the House, the legislative side of the House, to carve out room for the acknowledgment of faith in public square, and using the jurisdiction clause of the Constitution, I think, is the most effective way to do that. But it's not as effective as the court as a group coming to understand the sensitivity of the public on that issue.

PROFESSOR GROVE: I think, if I could interrupt, I think the orthodox argument for congressional power to expand and contract the jurisdiction of the inferior federal courts is that Congress has the power to create them initially. That's not true with the Supreme Court, although there is the regulations and exceptions clause with respect to the Supreme Court's appellate jurisdiction.

I wonder, do you see a difference between congressional attempts to limit or remove certain categories of subject matter jurisdiction in the lower federal courts and efforts to limit the appellate jurisdiction of the Supreme Court?

CONGRESSMAN PENCE: Yes.

PROFESSOR GROVE: I mean, I think the argument has been made a number of times, and it rings true for me for what that's worth. Over time the Supreme Court has developed, really as its core function, the final decisions about the meaning of the Constitution. This is a function that has become so integral to the work of the court and to the court's role within our national, and not just national, but in our national government and federal system to try, to take too much of that away, it seems to me, presents real problems and a little different from the ones we think about in connection with the kind of bills that would strip the lower courts.

Although it is true that most of this proposed legislation would affect the Supreme Court's ability to hear these cases as well.

CONGRESSMAN HILL: Let me begin by saying, Mike, that just because you agree with me doesn't mean you're going to be damaged goods. Everything is going to be okay.

(Laughter)

I guess we're getting to the point where we're going to depart from agreeing with one another here, right now.

I have always voted against the bills that would strip the courts of jurisdiction over certain issues and, quite frankly, was attacked for it politically. I voted against the bill that would strip the courts of hearing cases as relates to gay marriage. My opponents turned that into meaning that I am for gay marriage, which I am not personally. I just don't think that that should be in the Constitution. To say that the Supreme Court is barred from hearing those kind of cases seems to me to be a departure from the separation of powers. I have a feeling that if we passed a statute like that and it was challenged in a court of

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16. *See Valedictorian Unplugged Over God Comments—She Says It Was Free Speech, Officials Say It Was Preaching*, MSNBC.COM, June 21, 2006, www.msnbc.msn.com/id/134613081.

law, that the courts would rule it unconstitutional.

But I do believe that people need to have a way to find relief other than just the legislative way, and the courts are designed to give people an additional avenue of relief. To say that, for the legislature or the Congress to say that that person does not have that opportunity for relief at the judicial level seems to me to be unconstitutional.

I'm not a lawyer, of course, but that's just the way I see it.

CONGRESSMAN ELLSWORTH: Just briefly, I was glad Mike gave me that moment to ponder, and Baron, because I just argued with myself about three or four times back and forth playing a game of Ping-Pong. I was thinking that we have to be very careful about how we make these steps in challenging every judicial decision and creating laws to do that. Then I hit the ball back to the other side and just remembered as late as a couple weeks ago there was a case, Goodyear was the plaintiff, I think—I don't remember, what was the other?[17] Where the lady had made the claim that she was unfairly paid over a period of eighteen years, Goodyear or something like that—we voted, and I voted for that.

It wasn't out of disrespect for the judiciary. They interpret law. I just thought we can clean this up for them and make that more clear. They decided rightly; let's change the law to make it so that this pay discrimination would not come into question again. I voted in favor of that amendment.

So I've kind of batted it back and forth, which doesn't clearly state a position, but something we do have to think a lot about.

PROFESSOR GROVE: We're beginning to run a little short on time and, Mike, as soon as you—

CONGRESSMAN PENCE: Can I make one other comment? There's one other piece of that that I've seen Congress act effectively on and that was, I think, the recent eminent domain case and controversy[18]—deeply offensive to many of us who see that power as a power to condemn property for public use. And the Supreme Court ruled that the government could use that power to transfer private property from one person to another for private use.[19] Congress was almost unanimously opposed to that. I think unanimously.

In the other way, you know, the power of the purse is really the Article I power that we have. And I think what Congress did very effectively was pass legislation rapidly that said the Supreme Court has made its decision, but any city or jurisdiction that utilizes this authority will not be eligible for federal grants and support. Interestingly, no one has used it yet.

(Laughter)

So it's not just about the jurisdiction issue, which I think I struggle with, and I agree, they're problematic to a certain point but they're part of a frustration many of us feel trying to carve out room for the acknowledgment of our Creator, God, in the public square particularly, but at the same time this other issue shows there are other weapons that the legislative branch has. In that case I think thus

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17. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007).

18. *See* Kelo v. City of New London, 545 U.S. 469 (2005).

19. *Id.*

far has used fairly effectively.

PROFESSOR GROVE: Thank you for speaking frankly about your views on that.

Two other matters I would like to introduce in the time we have left: One, judicial salaries; the other, cameras in the courtrooms.

The Judicial Conference allows the federal courts of appeals to decide for themselves whether to televise their proceedings and their arguments. We're familiar with cameras in state courtrooms in a number of places. We often hear, particularly members of the press, urge that it's very, very important that the transparency of the Supreme Court proceedings be encouraged. One way to do this would be to bring television cameras into the courtroom and to televise proceedings in general.

My question is: Does Congress have the power to regulate this? And if it does, is it a good idea?

I would just draw the question maybe a little tighter by noting that, I mean, if your answer to those questions is yes, you're at loggerheads with at least eight of the sitting Justices and then the supine or perhaps prone body of the ninth, Justice Stephens, who has said they will enter his courtroom over his dead body.

(Laughter)

There is a very strong feeling about this, I think, within the courtroom. Should Congress do this or shouldn't it?

CONGRESSMAN HILL: I'm not in favor of cameras being in the courts. So, if you watch Congress—there's a difference between a journalist reporting what's going on either in the courts or in the Congress and you having a live presentation. I just think the live presentation invites sensationalism and theatrics. We've got enough of that in Congress; I don't think we need that in courts. So, I just think it's a bad idea.

Whether or not Congress has jurisdiction over that kind of thing, I think that is a question that has not really been answered and would have to be challenged in a court of law if we actually did something about putting cameras in the courts. So, I can't answer the question.

But generally speaking I think cameras, especially in the Supreme Court, is a bad idea.

CONGRESSMAN ELLSWORTH: I think the jury is still out on this, also. No pun intended. I think we're doing the right thing in Indiana. We've got test courts. I don't think it's being used a lot from what I've been reading in *The Courier* just this last week. But, as Baron said, people act differently when there's a camera. The lawyers will act differently, the defendants act differently when the live—I'm all for public, the light being shown on the public goings-on, but I think that is one where I would take the input of the judges to help make that decision on how they felt that it impacted their court and the decision-making process before I would make a decision and/or vote for that.

But the record is there. There's nothing hidden in a court proceeding, just whether you put it on a television show is really the only difference there. Reporters are allowed in there; there's nothing hidden. So, again, my input would come from the experts sitting on the bench before I would make any decision.

As far as whether the Congress has the authority? Believe me, someone will try it and try to pass it. Then it comes down to the individual.

CONGRESSMAN PENCE: I was for cameras in the courtroom until that judge in the Anna Nicole case.

(Laughter)

That was a joke, but you all groaned.

I am really perplexed. I am solidly on the fence on this one, because I really believe in open government. Professor Grove mentioned some work I had done in that area in terms of increasing transparency. I've done work on trying to reform earmark legislation. Colleagues have supported those efforts to try to create greater transparency. I think daylight is a great antiseptic.

Frankly, when I was the plaintiff in the lawsuit that challenged the McCain-Feingold case, my footnote in history was that it was *McConnell, Pence, et al., v. FEC*.[20] I had a great seat in the Supreme Court for oral arguments. I had never been over there. I am not just complimenting Justice Alito because he's here, and his colleagues, right front and center. I was dazzled by the acumen. I want cameras in the conference room at the Supreme Court.

(Laughter)

Forget the Court.

But, I mean, it was very enlightening. It was very exciting as an American to see the intimacy and the seriousness and the professionalism and the deference of the lawyers and the Justices. But I share my colleagues' concern, particularly with my friend who was in law enforcement. There is serious business going on there, and it's something that becomes very serious when cameras are present. We live with that every day.

I love C-Span; it was founded by a Hoosier, Brian Lamb, proud of it. But you talk to the old-timers, don't you? Baron and I do, and they say before those cameras were at every single hearing that when House is in session, Congress is at play; and when committees are in session, Congress is at work. Increasingly, as Brad said, committees are now becoming places where we're at play a lot of times, too, and I think cameras had a lot to do with that. So, I am really mixed.

PROFESSOR GROVE: We have just one minute, but let me ask whether there is any real disagreement among the members of our panel today that it's time for federal judges to be given a very substantial pay raise, leaving perhaps for later discussion exactly what substantial means, but substantial.

(Laughter)

I know, Mike, you've talked about the dangers of salary erosion for federal judges; and, Brad, is there something you would like to say about that?

CONGRESSMAN ELLSWORTH: Well, before I heard the professor speak—no, I'm kidding.

I'm probably the wrong one to ask. I have made a pledge not to take a congressional pay raise until we balance the budget. So, I will never take a congressional pay raise. If I can't prevent that, I'm going to donate it to charity.

That being said, what I feel shouldn't be inflicted on you. It should totally

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20. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

be separate. Your salary should not be tied to a member of Congress. My pension as a sheriff shouldn't be tied to the salary of the seated prosecutor of the State of Indiana, but it is. It's wrong. We need to look at that.

I know that Congress was working that last couple weeks. Mike and Baron, we figured it out one time, for about six dollars an hour for the hours we were putting in before we left for the August recess. So, we were a little underpaid for at least that time period.

But, no, I think it needs to be looked at. I know that there are questions, something that at least has to be discussed is the jurisdiction. I know that the cost of living in Los Angeles for a federal judge is different than that in Terre Haute, Indiana. So, that might be something to look at and how you figure that, but it is certainly an area to explore. Certainly we know what you put in, and we know that it would be time. The national times are tough in the U.S. government, as you know, with our debt and our budget, but I would certainly look at that.

CONGRESSMAN HILL: Well, I don't have the same convictions that Brad has on the salary issue for members of Congress. And I believe that we ought to have people in the judiciary that are compensated in meaningful ways.

But I don't agree with the separation. I think that—

PROFESSOR GROVE: Not decouple?

CONGRESSMAN HILL: I would not decouple. If you're going to get a pay raise, I want one, too. So, I would not be in favor of decoupling.

I do believe that members of the court do not want to become members of the court for reasons of salary. I think they want to become members of the court for a lot of different reasons; first and foremost is to serve their country. But because of that dedication, I think that we need to make sure that people who are making those kinds of decisions to serve ought to be compensated fairly.

PROFESSOR GROVE: I think time has run out for this component of the program.

CONGRESSMAN PENCE: May I address it?

PROFESSOR GROVE: Almost run out.

(Laughter)

CONGRESSMAN ELLSWORTH: He always gets the last word.

CONGRESSMAN PENCE: With the chairman's indulgence, I'd love to speak to that. I know we've talked about it, Jeff.

Scripture says a laborer is worth his wage.[21] I'm a very stingy conservative. I've led the stingy conservatives in the last Congress. But I think the time has come for us to make, not a pay raise, but a significant correction in the compensation of judges. The ways we pay federal judges today is what starting associates make on Manhattan Island.

Justice Breyer and Justice Alito came in and gave such an extraordinary presentation to the Judiciary Committee that day. What resonated with me the most was the notion that what should be the capstone of a career for financial reasons is increasingly becoming a stepping stone in career. I think that represents a very serious threat to the credibility, and I say this very gently, the

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21. *See* 1 *Timothy* 5:18.

integrity of the institution of the federal judiciary.

Where I would differ with Baron is I'm going to meet with Chairman Conyers next week, and I'm going to try and be helpful on this, which will require that it be offset with other spending cuts the administration seems to be prepared to endorse.

But I'm concerned, Baron, and I'm like you, I fear Mrs. Pence more than I fear voters.

(Laughter)

I've never missed a cost-of-living increase for Congress. But in this case, because we have such a large correction, that's necessary. Even if it is a temporary decoupling, we have to temporarily decouple to make a market correction.

I just think this is one of those moments where we need to recognize the long-term interest of an institution and attracting the kind of people that we want to attract at the end of distinguished careers, that would be the capstone of their career, that we need to find a way to be fiscally responsible to do this, and I look forward to working with many of you in Congress.

PROFESSOR GROVE: Well, I think on that note of presumed agreement between the congressmen over here and the federal judges in the audience, we should say thank you to our representatives who are here today. We really appreciate it. Thank you for your comments.

(Standing ovation)

(A recess was taken.)

PROFESSOR GROVE: To me falls the pleasure of introducing the Honorable Dan Coats who will provide a fitting introduction for Mr. Justice Alito and his keynote address, which is really, Justice, the keystone of our program today.

In introducing Dan Coats, I want to tick off a few accomplishments. It's kind of hard to know where to begin. There's a long list, I guess I would like to start by saying that Dan is a distinguished alumnus of our School. He's been a wonderful friend to the School for over thirty years. Just last week I came across a letter that he had written to me twenty years ago talking about a then-recent visit he had made to the Law School.

He was here just about a year ago talking about the confirmation process for Supreme Court Justices and recounting some of his experiences working as "the sherpa"—and that's Dan's term[22]—for Mr. Justice Alito and helping him navigate the shoals of the confirmation process. And he'll be here about a month from today talking about his experiences and insights he developed as the U.S. Ambassador to the Federal Republic of Germany.

In his public life, Dan Coats was a four-time congressman from Indiana, although he did not serve his fourth term. Senator Quayle was tapped by father George for the vice-presidential nomination. Dan was appointed his seat, two years later was elected in an interim election in his own right, was then elected

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22. *See All Things Considered: Samuel Alito Prepares for Confirmation Hearings* (NPR radio broadcast, Nov. 7, 2005).

to a full term in 1992, and after ten years of service in the Senate, he became ambassador to Germany.

So, just a final word of thanks to Dan for your instrumental role in bringing Justice Alito here today. I would be remiss if I didn't also mention the name of Judge Rugie Aldisert for whom I clerked back in the last century who is a friend of Justice Alito's and who also provided some encouragement for him to be with us here today.

So thanks to both Dan Coats and to Rugie Aldisert. And, Dan, thank you very much for coming here today.

(Applause)

INTRODUCTION OF JUSTICE ALITO

AMBASSADOR COATS: Professor Grove, thank you for—after your introduction of the members of Congress, I was a little nervous about what you might say, and you said all the positive things which I had forwarded to you by fax earlier.

(Laughter)

I just have to make a couple of comments. One, in case any of you were wondering, I didn't even make the honorable mention list of the most beautiful people in Congress.

(Laughter)

My hair follicles were in a race for me making that list, and my hair defoliation won.

I am pleased to be able to welcome Justice and Mrs. Alito here to Indiana. I think I probably speak—I know I speak—for everyone here in this room that we are very thankful and grateful that you have taken the opportunity to come to Indiana and to participate in this Conference on the relations between the Congress and the judiciary, a topic which both of you have had some experience, which I was privileged to be a part of. Having been through that process with you, I was a bit surprised that you were willing to come out and readdress that topic, but we're grateful that you're here.

I first met Judge Alito just very shortly after President Bush had nominated him to a position on the Supreme Court. And while then Judge Alito was highly respected by his peers in the legal profession, having received the highest rating that the American Bar Association Supreme Court Selection Committee can offer, he was not known to the general public and, in fact, to many of the senators who would be voting on his confirmation.

I quickly learned that this new nominee was a federal appellate court judge of fifteen years experience on the bench with hundreds of opinions and cases under his name. A former Assistant Solicitor General, U.S. Attorney, Deputy Assistant Attorney General in the Office of Legal Counsel, and a recognized constitutional scholar, this indeed looked like the right appointment.

A man who knew the law, he had a clear sense of the judiciary's role in relation to the other two branches of government. In this regard, then Judge Alito had stated, "Results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policymakers, and we

shouldn't be implementing any sort of policy agenda or policy preferences, including invading the authority of the legislature."[23]

Suddenly this modest, humble, and private man was thrust into the intense spotlight of Washington politics. Every aspect of his public and private life was considered fair game for those who desperately did not want to see any nominee of President Bush confirmed to what many thought would be the fifth vote on the court, even though that did not turn out to be the case.

His every written opinion was scrutinized for ideological, political, and, even in some cases, possible religious bias. Political opposition groups called to get Alito and, therefore, get Bush. The intensity of that three-month-long confirmation process was greater than anything that I had witnessed in nearly two decades of public service. He was immediately given any number of labels, mostly unfair and certainly unflattering. But in his reply to the charge that he was an ideologue, the judge stated that, and I quote, "Such a person has a formula in mind in deciding cases. Facts are secondary to the result."[24] "That is not me,"[25] he said. "The judge's only obligation, and it's a solemn obligation, is to the rule of law."[26]

The media crush was equivalent to that of a rock star. Nearly blinded by the harsh lights of the cameras, Judge Alito stated to me that, "No one ever takes my picture, not even at family reunions."

(Laughter)

Those who watched the drama of the confirmation hearings witnessed the intensity of the three-day ordeal to which he was subjected, not to mention the three-month ordeal that preceded all of that. Through it all, Justice Alito never became defensive, never lost his temper, calmly answered each of his critics, and displayed a temperament and an even-handed fairness that silenced his critics.

I had the great privilege of sharing with Judge Alito that moment of relief and pure joy when the presiding officer of the Senate announced his confirmation. And I now have the great privilege of bringing to you and introducing to you not Judge Alito, but Supreme Court Justice Samuel Alito.

(Standing ovation)

(Justice Alito addressed the conference off the record.)

(Standing ovation)

PROFESSOR GROVE: On behalf of the Law School, Justice, I'd like to give you these small tokens of our appreciation for your being here. We are aware of your interest in Italian heritage, Italian cooking and cuisine, and I think these presents will reflect those interests. I'm not at liberty to say any more.

(Laughter)

But I hope you'll take these with you and open them at your leisure.

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23. *Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court Before the S. Judiciary Comm.*, 109th Cong. (2006) (response by Judge Samuel Alito to question by Sen. Charles Grassley, S. Judiciary Comm.).

24. *Id.*

25. *Id.*

26. *Id.* (Judge Alito's Opening Comments).

(Applause)

JUSTICE ALITO: Thank you very much.

PROFESSOR GROVE: It's time for lunch.

(A lunch recess was taken from 12:10 p.m. until 1:10 p.m.)

AFTERNOON SESSION

MAGISTRATE JUDGE BAKER: Good afternoon, everybody. My name is Tim Baker. I am a U.S. magistrate judge in the Southern District of Indiana. I also serve as chair of the Federal Judiciary Committee of the Indiana State Bar Association. It's my pleasure to welcome you all here today to the Conference, and I hope you're all having a good time.

(Applause)

I can assure you I am because not only have I enjoyed the Conference tremendously, but I even got to have lunch with my wife today.

(Laughter and applause)

So, that doesn't happen very often.

It is now my privilege to introduce our next speaker, Professor Charles Geyh, who is a professor at the IU School of Law in Bloomington. The way that Professor Geyh came to be involved in this program is as follows. When I started contacting people to let them know that we were putting together this Conference, the resounding response that I got was, "Is Professor Geyh going to be speaking?"

Several people asked me and almost insisted that I make sure that Professor Geyh was, in fact, on the panel. So I did a little research on Professor Geyh. If you've looked at his bio, you see that he certainly knows a thing or two about judicial independence, written more articles than I can count, appeared on talk shows, testified in Congress and has even written a book and that book is *When Courts and Congress Collide*,[27] which for $29.95 is available from Amazon.com.

(Laughter)

So, you've heard the expression, "He wrote the book on it." Professor Geyh definitely wrote the book on it. Please join me in welcoming Professor Charles Geyh.

(Applause)

JUDICIAL INDEPENDENCE: DOES THE PUBLIC REALLY CARE?

Professor Charles G. Geyh
Indiana University School of Law—Bloomington

PROFESSOR GEYH: Judge Baker, there is no way in hell I can live up to that introduction, and I'm not really going to try. Let me begin by thanking the state bar for pulling this program together. And thanks, too, to the Law School for hosting this extraordinary program and including me in it. I am humbled and

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27. CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE (2006).

deeply appreciative.

Today my topic is up there in black and white, "Judicial Independence: Does the Public Really Care?" What I want to do is really break this thing into two parts because there really are two questions embedded in the one. The one has to do with what is judicial independence, and the second has to do with does the public care.

As to the first, I think my goal is really to underscore the complexity of the subject a little bit and to unpack it some, and then to move on to the core of the talk which we'll be dealing with: whether the public cares. And the answer, which is really quite true to form for a law professor is: The answer is yes and no, and yes, and no, and ultimately yes. But I'll get there when I get there.

Starting with the business of what is judicial independence. I am guessing that of the judges in the group, all of you have been to one and probably multiple conferences on the subject of judicial independence, where an entire program is devoted to what is judicial independence or where you are handed little slips of paper and told, "Write down your definition of judicial independence." To my way of thinking, the business of writing down a definition misses the point because ultimately what we're stuck with is a very complicated concept that has multiple definitions, and understanding those multiple definitions is really important to understanding why the public response to judicial independence is as complicated and multifaceted as it is.

Now, this slide will do one of two things. It will either impress you with the crystalline complexity of judicial independence, or it will lead you to lose your will to live.

(Laughter)

Either way, it will serve my purpose of demonstrating that this is pretty complicated stuff. There's a lot going on here, and let me unpack it a little bit for you.

In the beginning, we've got judicial independence up here. And it is, I think, fairly broken down at the most elemental level into two ideas. One is that we have complete independence; the other is that we have qualified independence. When we're talking about complete independence, what I am talking about here is dictionary definitions, right? Independence means that you are basically free from any outside influence or control. If that is true, then judges aren't independent at all, and you get people like Senator William Giles who was alive and kicking, almost literally, back during the Jefferson administration and was his generation's answer to Tom DeLay saying, because judges, for example, can't set their own budgets, can't appoint themselves, are subject to removal through impeachment, that they aren't independent. Similarly, you have Terry Peretti on the West Coast making the same point today.

They assume, I think, or what they're talking about, is this notion of judges being absolutely independent and it's not true and, therefore, judicial independence doesn't exist.

The better way of looking at it, and the way people in this room look at it, is by recognizing it is instead a qualified concept. Judicial independence is qualified by the purposes it serves. Very few people would argue, I think, that judicial independence is an end in itself, that instead it is a means to other ends,

and you define it and circumscribe it with reference to those ends.

That being so, you can subdivide the qualified independence into its institutional and decisional dimensions. The idea being if what we're up to doing, saying there are limitations on judicial independence, it's got to serve purposes, and there are only two basic purposes that I think one can identify pretty easily. One is that independence serves the judiciary as a branch, that it preserves the integrity of judiciary against encroachments by the political branches, for example. Thus, one can talk about—and I think one frequently does hear Chief Justice Rehnquist—basically going to the stump and saying when judges aren't given salary increases on a regular basis or cost of living adjustments, it weakens the judiciary as a branch; it compromises their independence as an institution. One can make a similar claim about budgets, that when budgets are cut back too far, it impairs the judiciary's independence as an institution.

In those situations, unfortunately—you know, my topic is does the public care—when it comes to this one, it's a tough sell and you all know it, right?

There's a practical matter—Chief Justice Rehnquist gave his life to trying to sell this issue time and again, and it is very difficult to have the public think about this as an independence issue. And one can explore why that is right, that the judges aren't getting paid more than they are. So, they're unsympathetic and so on.

My point is that when we're talking about where the action is from the public's perception, it is with this other form of independence, decisional independence, which I think you can loosely define in terms of saying independence, you know, exists to enable judges to make decisions without threats or intimidation, all right? To make decisions in individual cases, that would be decisional independence.

When we're talking about decisional independence here, though, even that isn't really elemental enough, because we can further unpack decisional independence into component parts as well. Because when we're talking about worrying about judges making decisions free from the wrong kinds of influences, we're really talking about external threats and what might, for want of a better term, be thought of as internal threats. In other words, from an external standpoint, we are worried about outsiders being legislators, governors, presidents, or maybe even judges themselves interfering in untoward ways in the decisions of judges. Or we could also be talking about judges' independence essentially from themselves, their ability to follow the law and bracket out their own personal biases in an effort to actually follow the law.

To make this a little clearer, I think what you can say about relational independence—here I'm talking about the external variety, what I am saying is here—we're talking about whether judges are independent of these outside forces or in relation to these outside forces so that Article III judges get some relational independence from Congress by virtue of tenure and salary protections, all right? Conversely, they are not relationally independent as far as their budgets are concerned, to give you an example, all right?

In contradistinction of that, behavioral independence sometimes travels hand in hand with relational independence. If judges are made beholden to the

legislature, then one can fairly assume that their behavior when they make decisions is going to be to kowtow to the legislature; that can be the operating assumption. Conversely, the argument can go that if judges are relationally independent, in other words, if they get their independence from the political branches and the public, they will be liberated to follow the law and they will do so. But that isn't necessarily so. In other words, what we see in some instances is judges who are relationally dependent. Judges in Eastern European countries who are under the thumb of others may nonetheless be heroic and make decisions that are behaviorally independent, that follow the law, notwithstanding the fact that they're at risk of getting fired when they make those decisions.

Similarly, you can see judges, for example, in the former Soviet Union who have now left the control of, say, the parliament or of the president, but who are so accustomed to the business of basically being beholden to others that, you know, they continue to make decisions that are behaviorally dependent on someone else, even though they don't have to. So we have each of those as sort of distinct phenomena.

We also—and in some ways this is a prelude to the more important point. When we're talking about behavioral independence, the business of whether judges actually follow the law and actually disregard the pressures that are out there, we are also, in a very important way, talking about the ability of judges to resist their own passions, to separate themselves out from their own backgrounds, their own politics, their own political predilections, and apply the law.

So, we've got these two separate ideas, both of which I think are in play. Now, if we sort of bear down on each of them in turn—let's look at relational independence a little bit more closely. Where does it come from?

In the federal system, I think it's understood that federal judges have a lot of independence. They really do. Some of it comes from Article III, as I said before. That's what I would characterize as doctrinal independence, right? By which I mean, if some Congress gets the bright idea of cutting judicial salaries, it's not going to stand. Why? Because they're going to go to court, have it declared unconstitutional as contrary to Article III. Constitutional doctrine says you've got that kind of independence.

But, we also have other kinds of independence that are less thought about. When it comes to, for example, functional independence, there are circumstances in which judges have certain freedoms that exist simply because Congress hasn't bothered to act. During the nineteenth century, to give you an example, there were district judges spreading across the western United States like crazy. There were so many of them, the Supreme Court rarely heard arguments from their cases. There just were too many of them, and as a consequence, they were functionally free to basically do what they damn well pleased, knowing that they weren't ever going to get reversed. The business of interposing a court of appeals structure came at the end of the nineteenth century; it ended their functional independence to basically do what they wanted and subjected them to a level of control from fellow judges. Was it a threat to their independence? No. Was it something that was contrary to the Constitution? No. It was just something that finally Congress got around to doing it after thinking about it for half a century, all right?

Finally, the third form of—really again subpart of—relational independence is—we've just talked about—independence that comes direct from the Constitution. We've talked about independence that comes basically by accident, and then we talk about what I think is, and it really is the focus of my book, the far more important form of independence. If you think about it, if Congress wanted to drive the federal judiciary to its knees, it could do it tomorrow. It could impeach them for making bad decisions. It could impeach them for having bad hair. And we're already told that these are political questions that the Supreme Court isn't going to involve itself with, so Congress is free to do that.

Congress, I think in my estimation, could strip the lower courts of all kinds of jurisdiction. It could disestablish all kinds of courts. It could slash all kinds of budgets, and there wouldn't be much that the federal courts could do about it. That doesn't happen. It's not necessarily because it's unconstitutional. It's not simply a matter of, well, they just haven't gotten around to it because, Lord knows, they've tried. It's because there is a custom of independence that has evolved over the course of 200 years where we say we have certain judicial independence and norms that say this isn't the way we do business here.

So, for example, when it comes to impeaching judges for bad decisions, they tried that early on, they've abandoned it early on, and it has literally never happened. So, I think for that reason you can sort of see these as three different variations on the judicial independence theme for when it comes to controlling relational independence.

When we're looking instead at behavioral independence, the question of whether, on a micro-level, judges are actually following the law thanks to their independence, we have three different ways of looking at the world there, too. One is the legal model, and I don't need to dwell on it because I'm surrounded by lawyers here. But the notion is if judges are given relational independence, if they're given protections like life tenure, like a salary that can't be cut, they will follow the law. They take an oath to do so; they will honor that oath.

On the other hand, the political scientists of the world, not all of them but a good chunk of them, adhere to what is referred to as the attitudinal model of judicial decision-making. When judges are given independence, they argue, the data they have generated suggests judges disregard the law. They follow their own political predilections. They are, in other words, not behaviorally independent at all. They don't follow the law. They follow their own values. They follow their own politics. And so independence relationally doesn't generate, doesn't translate, into behaviorally independent judges who respect and follow the law.

The third group in that pack dealing with the neo-institutional model, they basically split the difference and say judges are complicated people. In some ways I'm sympathetic to this category, by the way. We're past the point when the legal realists hit town in the 1920s, it's too late in the day to say law is all there is to do with what judges do. Law is part of it. Background is part of it. Ideology is part of it. Philosophy is part of it. The institutional setting that you find yourself in is part of it. So, all of these complicated factors contribute to the kinds of decisions judges make. So, from that vantage point, when judges are confronted with questions, yes, they are independent in part, but they are also in

some ways influenced by these other considerations.

Now, I appreciate the fact that, thus far, no one has sort of pitched face forward on their desk, because this is the dull part. I'm now getting into the stuff that I find intrinsically more interesting, which is, okay, these are our various definitions of judicial independence, does the public give a damn?

Here I've got five basic points. And I kind of like them. Total accident obviously, but I've got this nice little pyramid effect going on here with the way the script worked out.

At the most elemental level is what I would characterize as the platitude. Before I get going, I want to both offer thanks and an apology to Chief Justice Randy Shepard at this point because last year he hosted an excellent conference on the centennial of Roscoe Pound's address to the ABA [American Bar Association], where I did give a talk, and where I am now sort of retreading what I did in part there. The thanks are obvious for hosting that program; the apology is he's enduring it the second time, and I'm sorry about that.

But bringing it down to the level of platitude, at the most elemental level, I think what we're seeing here is that judicial independence is rather like lollipops, rainbows, and free checking. What's not to like about it? And you see statements, you know, Chief Justice Rehnquist referred to it as the "crown jewel." Ralph Mecham referred to it as the "cornerstone." My favorite was ABA President A.P. Carlton who said, "Judicial independence is precious to our way of life. Judicial independence is a fundamental principle on which our country was founded and for which Americans have died, not only at Yorktown and Valley Forge, but the Alamo, Iwo Jima, Inchon, Khe Sanh, and, now, Mezar-E-Sharif."[28] I mean, good Lord, who could be opposed to that, right?

(Laughter)

Now, the problem is that, if we come back to the chart, this is really operating at this level and really at the notion that judicial independence is just at the level, at its most basic level is a great thing.

Now, one needs to be careful even here because within the public the term independence doesn't resonate well all of the time. That's, I think, because they interpret it in terms of the complete definition, that it means judges are utterly unaccountable. We don't want unaccountable judges; hence, maybe as a platitude we're not even sure about that. So, for that reason, people who are doing communications work for judges are saying your better bet is to talk in terms of fair courts, not independent ones, fair judges, impartial judges, strong judges, all of which plays well to the public and which underscores that ultimately, at least at the platitude level, yes, the public is with you. They're okay with it. They like judicial independence at least defined in that way.

Below that is the level of what I would characterize as naked self-interest. At the micro level this is easy to understand. If you are a litigant, right, you don't want an independent judge. You don't want an impartial judge. You want a judge who will give you a win, right? It's as simple as that. Who doesn't?

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28. Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 FORDHAM URB. L.J. 835, 837 (2002) (internal footnotes omitted).

So at a micro level that is clearly, I think, the case. If you're litigating, you want to win. You know, maybe if you're a lawyer you'll say, "Well, I would rather lose than lose an independent judiciary." Yeah, but your client might think otherwise.

(Laughter)

And I think that similarly at a macro level—at a macro level—the political majority will be saying that we, the majority, think this is really important. We don't want you getting in the way. We want to win. We don't want your independence, we want your obedience.

So in one of the finer quotes by a governor in recent memory is California Governor Gray Davis who was quoted as saying, "All my appointees, including judges, have to more or less, reflect the views I've expressed in my election, otherwise, democracy doesn't work."[29]

(Laughter)

"They are not there to be independent agents. They are there to reflect the sentiments that I expressed during the campaign."[30] Then, of course, within twenty-four hours he says, "This doesn't mean I don't support their independence 100%."[31] You know, fine.

I mean, very quickly after there was sort of like a Soup Nazi event that happened. No governing for you, Gray Davis. And so he was out of office.

(Laughter)

But the point here is, though, I think this sentiment is likewise reflected in some polling data. And from this point forward in my talk, I am going to talk a little bit about polling data, because the polling data is all over the map. On some level you can basically say, "Stupid public, they don't understand what's going on." There may be some truth to that but I think there's also some truth to saying that the reason the public is all over the map is because they really are thinking about judicial independence in different ways.

At this level, getting back to the chart, we're talking about really what amounts to independence at the basic decisional level here. What they're saying is, "I'm not sure I like it if it means I could lose." That's a perfectly natural response at really the naked self-interest level.

When it comes to polling data, we do have 56% of the public surveyed in a poll conducted in 2005 who reported their agreement with the proposition that court opinions should be in line with voter values and that judges who repeatedly ignored those values should be impeached. If you don't go along with us regularly, out you go. Why? Because we want winners. We want to win.

Now, below this level of naked self-interest is a level that I have called enlightened self-interest, which says in a perfect world I'd win every time. But

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29. William G. Paul, Op-ed., *Keep the Judiciary Independent*, CAL. BAR. J., April 2000, *available at* http://calbar.ca.gov/calbar.

30. *Davis Wants His Judges to Stay in Line: He Says They Should Quit if Views Change*, S.F. CHRON., Mar. 1, 2000, at A3.

31. *See* Editorial, *A Judge's Proper Role Is Independent Agent*, S.F. CHRON., Mar. 3, 2000, at A24.

I am not dumb. I know that my opponent feels likewise, and I also know that I may not be able to control the outcome every time. As an individual, he may have more influence. As the political majority, I may be out on my ear tomorrow. And that fallback position: If I can't win every time, the better bet may be for us to have a neutral, an intermediary, someone who is immune from both of us and can give each of us a fair shake. So, in the spirit of enlightened self-interest, the idea is we're all for judicial independence.

Here, I mean I think it's simply understanding that litigation is a zero-sum game, and if I can't control the outcome and my opponent can, I'm worse off than if neither of us can control it and we consign it to a neutral. Here is where you get the dreaded sports metaphor in abundance, right? Here is where judges are umpires, judges are referees, and you don't screw around with the referee. Because enlightened self-interest says, yes, you'd like your team to win, but the moment you get to influence the referee is the moment they get to influence the referee, and then where will we be?

So we end up seeing people like Senator James Jeffords saying, "The first lesson we teach our children when they enter competitive sports is to respect the referee, even if we think he might have made the wrong call. If our children can understand this, why can't our political leaders? We shouldn't be throwing rhetorical hand grenades."[32]

So in the spirit of enlightened self-interest, give it over to the referee. Back off from the referee. We, the public, like independence. And indeed, 73% of the public surveyed reported their agreement with the statement that judges should be shielded from outside pressure and allowed to make their decisions based on their own independent reading of the law.

Now, bear in mind that this is not entirely consistent with saying 56% also agree judges should be thrown out on their fannies if they make decisions contrary to the public's values. There's a tension there. But I think that what we're dealing with here is we're working our way down the chart and looking at the need for relational independence here and saying that on the whole relational independence is very important to preserving the rule of law and to basically making sure that there's a level playing field. So, even though there is that sort of tension in the polling data, I think what it comes down to is that they're looking at judicial independence in slightly different ways.

Similarly, 83% in a different survey felt that judges should be protected from "political interference" by Congress. Again, consistent with this notion of enlightened self-interest.

Now, beneath the enlightened self-interest layer is a fourth layer, which I have called skepticism of judicial motives. An assumption underlying enlightened self-interest is that judges insulated from outside pressure will follow the law. In other words, that referees will do what they're supposed to do, which is play it by the book, follow the book, not create the book. And nowhere is that better expressed, I think, than by Chief Justice Roberts during his confirmation

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32. Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has "Run Amok," Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at 21.

proceedings with yet another sports metaphor. "Judges are like umpires," he said.[33] "Umpires don't make the rules, they apply them."[34]

Beneath this layer, however, of enlightened self-interest, is a deep-seeded skepticism among some that judges don't do that, that judges are, in fact, out there making stuff up as they go. As one editorial writer put it in responding to Senator Jeffords whom I quoted before, "Sen. James M. Jeffords . . . wants us to respect judges just as 'we respect the referee' in competitive sports . . . [b]ut fans would never tolerate a baseball umpire changing the rules of the game by calling a batter out after two strikes."[35]

So, from this vantage point, right, we're moving toward behavioral independence and we're adopting what amounts to an attitudinal model. We're saying, "Judges, you get all this relational independence, you get all this life tenure, you get all of this salary that can't be cut, and what do you do? You abuse it. You aren't behaviorally independent; you're doing what you damn well please. We don't like it." So, therefore, we are in some ways deeply hostile to the notion of judges getting too much independence if that's what they're going to do.

So we end up seeing, again in polling data, some support for this proposition, that "56% of those surveyed"—again, this 56% figure comes up again and again—"share the view that judicial activism seems to have reached a crisis." They agreed with that statement, because "judges routinely overrule the will of the people, invent new rights, and ignore traditional morality."[36]

In another survey, totally different the next year, again 56% of respondents said they agreed with the statement that, "Judges always say their decisions are based on the law and the Constitution, but in many cases judges are really basing their decision on their own personal beliefs."[37]

Then, finally, you've got a survey in 2003 which found that 76% agreed with the statement that political, as a term, described judges well or very well. So, what we're seeing here, I think, is that there is this deep-seeded skepticism in some quarters. And, by the way, there's nothing novel about this.

In my book[38] I walk through sort of the historical argument and say every time we have a transition in political power, a realignment, we see something like this happening. Out goes the old boss; in comes the new. The old boss has appointed the previous judges who stay on. They cheese off the new guard, and you end up seeing threats ensue, and you end up seeing the new guard saying,

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33. Charles Babington & Jo Becker, *Judges Are Not Politicians, Roberts Says*, WASH. POST, Sept. 13, 2005, at A1.

34. *Id.*

35. Phyllis Schlafly, Editorial, *Liberals Rally Around Judicial Supremacy*, INTELLIGENCER (Doylestown, Pa.), Apr. 27, 2005, at 15A.

36. Martha Neil, *Half of U.S. Sees "Judicial Activism Crisis,"* A.B.A. J., Sept. 30, 2005.

37. CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV., JUDGES AND THE AMERICAN PUBLIC'S VIEW OF THEM: RESULTS OF THE MAXWELL POLL 3 (2005), http://www.maxwell.syr.edu/news/MaxwellPoll.pdf.

38. GEYH, *supra* note 27.

"We don't trust you guys because you're not following the law as we understand it."

So, in the first generation of our nation's history, out go the Federalists for the first time, in come the Jeffersonian Republicans along with Senator Giles, and they start trying to impeach these guys, disestablish their courts because they don't like what they're doing. A generation later, Andrew Jackson is out there saying, "Justice Marshall, I can't stand the sight of you. And my populist views of the way government should run are really in tension with this life tenure judiciary stuff, and we don't like the idea that you are dragging us down."

A generation later you've got the Republicans taking control of Congress during and after the Civil War. They're looking at the Democrats that decided Dred Scott[39] and saying, "Not again, buddy. We are going to strip you of jurisdiction, we're going to," one congressman said, "annihilate you if you get in our way."

Next generation and the populists and progressives are coming into power. They don't like the conservatives that are doing things like the *Lochner* case.[40] And they're saying, "Let's create judicial recall, let's end life tenure, let's do all kinds of things."

Next generation it's Franklin Roosevelt and the New Dealers who are fighting with the holdover conservatives who are getting in the way of his New Deal agenda. The generation after that it's the Warren Court, and then we get to our current regime. So, none of this, in that sense, is all too terribly new because in each case we're looking at the new people in power who are saying, "We don't particularly like what we have been seeing; throw the bums out."

Now, that gets us to the final stage that I want to talk about here, which is a judicial independence tradition. The reason I went through my little dog and pony show with five or six different cycles of judicial attacks through history is to say, yes, we've had these cycles but my point is—and again, this is something that I spend a lot of time with in the book[41]—that with each passing cycle, the success of efforts to squash the judiciary flat have failed more and more frequently.

So in the first generations, they managed to disestablish courts. They managed to defy court opinions. They managed to strip courts of jurisdiction. Beginning with the twentieth century, however, they got out there with a lot of sound and fury, and it basically signified sound and fury. By the time the twentieth century rolled around, cooler heads were beginning to prevail, and the argument was, look, we tried impeachment, bad idea; we tried disestablishment, bad idea; we tried court stripping, bad idea. You're going to keep trying it, but it's antithetical to what we think of as judicial independence—not because the Constitution necessarily demands it, but because we have these independence norms.

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39. Dred Scott v. Sandford, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

40. Lochner v. New York, 198 U.S. 45 (1905).

41. GEYH, *supra* note 27.

Coming back to where I was before, it really comes down to the customary independence point. We have this tradition, we don't treat judges this way. Some of us want to every time they make decisions we don't like, but at bottom, at core, there is this deep-seeded tradition of respecting the judiciary's autonomy at an elemental level. In some ways, I would argue that these periodic threats are healthy, because it's those periodic threats that galvanize the forces that say, "No, no, no, this isn't how we do things in America. This isn't how we work." We get out there, and we fight back the efforts to jurisdiction strip. We fight back the efforts to make judges fill out time sheets on a daily basis. We fight back on efforts to do things like create a solicitor general or an auditor general for the federal judiciary. These are the kinds of things that we look at and say, "Let's think about this with reference to our traditions and whether we're prepared to change our traditions in a fundamental way."

So, for that reason, what I would argue is those of us who are concerned about the independence of the judiciary ought to be concerned, both at the federal and the state level, about preserving these fundamental norms that keep the judiciary more or less in place despite these rather frightening things happening. And I think, just to shore this up, the public likewise goes along with this notion. I think, despite the data that I have presented before, there is other data that really suggests that the public is with us on this one.

Seventy-six percent of the public expresses some or a great deal of confidence in the United States Supreme Court, followed by 74% that expresses some or a great deal of confidence in the federal courts, and 71% for state courts. Pretty high numbers.

Seventy-nine percent of the public thinks that "dedicated to facts and law" describes judges well or very well, while 75% say the same thing of "fair" and 63%, not high enough but still well over a majority, think the same thing of "impartial."[42] So, at its core we do have this baseline of support for judges. We vacillate back and forth along the way, but when the chips are down, we don't want to threaten them unnecessarily. Yes, there may be some activists out there, but the solution isn't to throw the baby out with the bathwater. Ultimately, we have confidence.

Now, I will say that these confidence numbers are a couple of years old, and I haven't looked closely at the more recent figures, but they're a lot lower. The confidence levels have dropped significantly for judges in the last year. The reason I'm not pushing any panic buttons on that is because when you look at the confidence numbers in the President and in Congress, they're down in the twenties. I think it's probably fair to speculate that the confidence level applicable to the courts has less to do with anything the courts have done than with a generalized suspicion and disenchantment with government generally that may bleed over into lower numbers for judges. The fact remains that the numbers for judges are still considerably higher than they are for either of the other branches. For that reason I think there's some cause for saying that at this

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42. JUSTICE AT STATE CAMPAIGN, NATIONAL SURVEY OF AMERICAN VOTERS 5 (2001), *available at* http://www.faircourts.org/JASNationalSurveyResults.pdf.

core we still have this basic level of confidence.

With that I will subside. I've got a few minutes where I am delighted to take some questions and sort of filibuster my way until 2:00.

(Applause)

PROFESSOR KARLSON: I loved what you had to say, but this is a question I wished to ask earlier but I did not have an opportunity. That is to what extent is this perception of the public being generated by the fact that the Court recently itself has not shown great deference to its own precedent? I will just use as one example—it's not because I disagree with the result, but the process is very important. *Lawrence v. Texas*[43] not only reversed a relatively recent United States Supreme Court opinion on the exact same topic, but ridiculed in the strongest of language some of the authors of the earlier opinion.

When the Court does that to itself, isn't it an indication that the public might have a reason to lose trust in itself when it evidently has lost trust in itself as well?

PROFESSOR GEYH: I think the larger problem that you're pointing to is that when the public thinks about judges and courts, what they see and what they think about are the Supreme Court, that they see the Supreme Court as really emblematic of what judges do. And the political science data, although I am critical of it, is almost universally focused at Supreme Courts, and it is there where the court is a most political animal. I don't necessarily mean partisan political; I mean where the textual weave of the law is so open that conservatives and liberals can look at it in different ways, and that is where I think your point is, that there are internal controls that the system has to try to trim back on that which is precedent.

The problem is that at some point along the way, arguably the boat got rocked. And once it rocked one way, the other side wants to rock it the other, and restoring a state of equilibrium is complicated.

And I think that, yes, the Court declining to adhere to its own precedent does contribute to the level of skepticism that judges are not to be trusted because they're simply political animals. It is exacerbated by the press which reports decisions not with reference to the reasoning of the judges, but with reference to the political alignment of the judges who made the decision. It is exacerbated by the fact that the routine decision of the judges, the unanimous opinion of the Court where the conservatives and liberals converge and say, "This is clearly the case," doesn't get much press attention. What's interesting about that?

But that's where you can make the case for saying that law matters, that these people are independent, judges do follow the law. Lord knows, and probably many of you are pleased with this, at the trial level the press isn't covering you every day. You may be happy with that. But I think that if the press understood and if the public understood that the average case is pretty dull because you're doing it by the book, that would contribute to a more rounded perspective on what it is that judges do.

Yes.

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43. 539 U.S. 558 (2003).

UNIDENTIFIED SPEAKER: In terms of this point you were just making, in terms of public perception, do you think that when—a million and a half cases filed in Indiana courts each year, so lots of people in this State go into a trial courtroom year in and year out. When they see Judge Moberly, is their perception of her the same as their perceptions of the members of the United States Supreme Court?

PROFESSOR GEYH: Terrific question. The data suggests that when the public have this first contact, it is an enormously important one; and that, yes, when they have contact as witnesses, as litigants, as jurors, it is a terrific opportunity to introduce them to the judicial system in a way that leaves them thinking very favorably about it or unfavorably. And indeed, I think when you look at polling data—I'm giving you general data but it is highly misleading in the sense that there is a racial divide that is stark in which communities of color the levels of skepticism of judges and the judiciary is much, much higher, and I don't think that's because of their view of Supreme Court decisions. I think it's because of their view of who is being dragged into trial courts and how people in their courts are being treated in some instances.

So I guess my point would be that, yeah, to the extent that you take advantage—and most courts do, I think—by the way, I think most of the judges I'm talking to here have programs in place that are really designed to educate jurors. You show films. You have people coming and talking to them. You take advantage of that. That's a terrific thing, and I think that can have a very positive impact on the way things are going.

I think with the racial divide, it's also a sign that something else is going on here that we ought to worry about.

UNIDENTIFIED SPEAKER: Just to follow up, wouldn't it be better if the people in our State could see Judge Moberly on television rather than Judge Judy?

PROFESSOR GEYH: Boy, is that a rhetorical question. Yeah, and I don't know what—when it comes to cameras in the courtroom, my sense is that there is less of an issue on the appellate level than there is on the trial level because of concerns for privacy of witnesses and jurors and so on. But I would agree with you completely in the sense that were the public able to see—

UNIDENTIFIED SPEAKER: I'm just asking a question.

PROFESSOR GEYH: Yeah, abstract. I think that there is some understandable concern about it. There's also a sense that you can lose control of your proceeding. You know, witness the O.J. Simpson case. Although there I think one can fairly say the judge was special in that case, and it wasn't necessarily that every judge in a similar situation would have lost control of the case the way that one was lost.

But, short answer, yes, I do think when the public sees proceedings, they walk away with a more favorable impression almost inevitably. The more you can expose them to this, the better. The trouble with this is that when they film a trial proceeding, invariably the fifteen-second snippet that makes air time is the one where something screws up and goes badly, and that's the thing that you see. But if you could sit down and see half an hour of a court proceeding, I think that would make an important contribution.

Yes, Judge Barker.

JUDGE BARKER: Don't you think some of the bad rap that gets laid at the feet of judges in particular and the courts and the judiciary arises from the cases that come through, some of which result in an outrageous outcome, outrageous by popular public sentiment? The too-hot coffee that generates hundreds of thousands of dollars in damages, that sort of thing.

So there's not a lot of distinguishing going on by the public with respect to whose responsibility it really is and all of that, it's just, "Oh, my gosh, did you hear what happened in our courts today?"

PROFESSOR GEYH: Yes, and I think that there are a couple of things going on there. I think that one can make the case for saying that in some instances perhaps we're not making adequate use of Rule 11.[44] But I think in some cases one can also say that a little knowledge is a dangerous thing. So, that, for example, in the case of the McDonald's case, it really was all about you spilled coffee on your lap and you're getting lots of money.[45] That's an outrage.

You can still argue that it was a badly decided case. When you recognize that when you get a cup of coffee and you spill it, you expect to get a little bit scalded, but the idea of getting third-degree burns because they serve the coffee at the boiling point is something that one can fairly say, well, yeah, that's a little different. But that never made the press really.

So, I guess my point is that by summarizing trial court decisions in that way, you wind up in a situation where you can end up communicating—you're communicating a political point of view rather than reporting on the decision and, of course, the public will interpret it badly.

The flip side of this—and I know that because you're at trial level it's less applicable to you—but the other problem certainly at the state level, and I think at the federal level as well, is that we've gotten to the point now where when it comes to appellate courts, they serve two purposes. One is to essentially correct errors, and the other is to tell us what the law is.

The courts of appeals have basically become the final stop in the process of figuring out who the winner is and who the loser is. And the Supreme Court is basically not taking routine cases, simply correcting errors. They are picking or limiting their selection of cases to those in which there is an open question, a very important and open question. So, inevitably these are the cases that are the political hot buttons. They're the ones where the Court seems to be following the law least because they are the most policy-laden questions.

The easy cases where one would get the impression that you're simply following the law are the ones that the Court doesn't decide. They're the ones, let's leave that to the appellate courts. And conversely, the appellate courts are now stuck as the court of last resort in almost all cases, so they become a political hot button, too, and they're now under pressure.

So it is a very complicated phenomenon that we're witnessing here.

Any final questions?

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44. FED. R. CIV. P. 11.

45. Liebeck v. McDonald's Rests., P.T.S., Inc., 1995 WL 360309 (D.N.M. 1994).

I appreciate your indulgence. Thank you.

(Applause)

MAGISTRATE JUDGE BAKER: Thank you, Professor Geyh. Thought provoking indeed. I never thought that a judge could be impeached for having a bad hair day, but I guess that's a possibility.

We're going to take a short break now, and we're going to come back with our final panel, our panel of judges, who I suspect have a thing or two to say. So, if you come back here at 2:15 p.m., we're going to hear about that. Thank you.

(A recess was taken.)

VIEW FROM THE COURTHOUSE PANEL DISCUSSION

Panelists: The Honorable Larry J. McKinney, The Honorable Robert L. Miller, Jr., The Honorable Sarah Evans Barker, and The Honorable Randall T. Shepard

MAGISTRATE JUDGE BAKER: Good afternoon, everybody. It is my pleasure to moderate the final panel of the Conference, which will address "The View from the Courthouse." As you can see, we are privileged to have a very distinguished panel which I would very briefly like to introduce. I think most of you should be familiar with our panelists.

To my far left is Chief Judge McKinney, who has served as Chief of the Southern District of Indiana since January of 2001. He has served as district judge in the Southern District of Indiana since 1987. Prior to his service as a district judge, he was elected to be the judge of the Johnson Circuit Court in Johnson County in 1984 and in 1978.

To Judge McKinney's immediate right is Judge Barker. Judge Barker has served as a district judge in the Southern District of Indiana since 1984. She served as Chief Judge of the Southern District between 1994 and 2001.

She currently serves as President of the Federal Judges Association, a high distinction because that association is an association of Article III judges devoted to protecting the independence of the federal branch.

In addition—one additional item for Judge Barker—in 2004, former Chief Justice Rehnquist named her to a commission chaired by Justice Breyer to investigate the misconduct allegations against judges and to address that issue. So, based upon her presidency of the Federal Judges Association and that experience, she is uniquely qualified to do that today.

To my far right is Judge Miller, who is serving as Chief Judge of the Northern District of Indiana and has been in that position since 2003. He has been a district judge in the Northern District of Indiana since 1986. Prior to his service as a federal judge, he was the Superior Court Judge in St. Joseph County.

To my immediate right is an individual who you may recognize, Chief Justice Randall Shepard. Justice Shepard has been the Chief Justice of the Indiana Supreme Court since 1987. Prior to that he was an associate justice on that court. Prior to being appointed to the Indiana Supreme Court, he served as a judge in the Vanderburgh Superior Court.

In 2006, Chief Justice John Roberts appointed Justice Shepard to serve on

the Judicial Conference Advisory Committee of the Civil Rules of Procedure. So, the federal folks have already been tapping him for his expertise, and I am happy to do so today.

Although the focus of our topic today is on the federal courts and the way that federal courts relate to Congress, Justice Shepard is in a unique position to offer his views both on that topic and on some of the judicial independence topics as they relate to the state court judges.

One additional comment with respect to Justice Shepard. I know he's not feeling particularly good today, and he has been a good sport to stick with us throughout today.

Will you please join me in welcoming our distinguished panel.

(Applause)

Thank you. With all due respect to Professor Grove, that's a pretty good looking panel right here.

(Laughter)

Strained relationships between Congress and the federal courts are nothing new, but many have questioned whether those relationships today are worse than they ever have been. In fact, former Seventh Circuit Chief Judge Joel Flaum commented in 2006, "In my 32 years as judge, I have never seen relations between the judiciary and Congress more strained."[46] So, that's going to be the first question for our panel.

I think Judge Barker had a few things she might want to say today, so, Judge Barker, would you agree with Judge Flaum with respect to the way relations are today?

JUDGE BARKER: Well, of course, I always agree with the court of appeals.

(Laughter)

MAGISTRATE JUDGE BAKER: Unfortunately, they don't always agree with you.

(Laughter)

JUDGE BARKER: There's payback for that, Tim.

(Laughter)

It's the life we live—who agrees with us and who doesn't, and it's all up and down the line in the judiciary, and it's all across the map with the public.

I think that the atmospherics of our relationship sort of ebb and flow. I think they're better today than they were two years ago. I don't know why exactly. I know I would attribute it, in candor, to the change in leadership in the Congress; the former chairman of the House Judiciary Committee had a particular dislike for judges about which he spoke often. And the current chair doesn't have that antipathy towards the federal judiciary.

I think sometimes the pace of our lives and the expansive reach of government make people impatient, so they don't like it. You remember even when your children were small, mine now are grown but when they were small, a small child will ask their parent, "Who's your boss? Who's your boss?" We

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46. Pamela A. MacLean, *Judges Warned About Seminars*, NAT'L J., May 29, 2006, at 5.

don't like bosses. That's a very strong, individual characteristic among Americans.

We are individualistic and we don't like people telling us what to do, and that's what courts do. We have to tell people what to do. We try to issue orders that are self-enforcing so we don't have to send the marshal out with every one of them, but it doesn't always pan out that way. We have to sometimes go to the mat on some of these things.

So, there are strong negatives towards government generally, and they focus on the judiciary. And Congress receives that message because, as you heard in our panel discussion this morning, Congress has its ear to the voice of the public. So, they have to show they're responsive to that, they hear it, and they are looking for some way to alleviate whatever the irritations may be at any particular moment.

It is true that we're insulated by our jobs from a lot of the consequences that Congress has to contend with. We don't travel back and forth to D.C. We don't have to have two homes. We don't have to run for office. We don't have to work at keeping the public satisfied in a way that shows up at the ballot box and so forth, and I think there are resentments between Congress and the courts on that.

I made some decision—I know it was one of my best—but it generated a little bit of controversy. A woman called in—this happened not too long ago—and she was very negative on the decision, very critical of the decision. And I didn't talk to her, but she talked to my administrative assistant, and she ended her spiel about how bone-headed a decision it was, how stupid, how un-American, etc., saying, "You tell Judge Barker I will never vote for her again."

(Laughter)

So people are looking for a way to punch at the judiciary and the decision-makers, and we don't give them very many ways to do that. But we have to have that insulation in order to do the work that's entrusted to us.

MAGISTRATE JUDGE BAKER: Thank you.

Judge McKinney, what do you think about the current state of those relations?

CHIEF JUDGE McKINNEY: I just wanted to mention that I talked with that woman that talked to you, and I did such an excellent job she'll be looking for your name on the ballot the next time.

(Laughter)

But it's interesting, the whole notion here is interesting about judicial independence and how we get along with the Congress, and I don't think about it very often. I think one of our responsibilities as judges is, first, before we think about what our relationship is with Congress and whether it's been as bad as it's been in the last thirty-two years, to make sure that we're doing what we're supposed to be doing. As we sit there every day resolving disputes in such a way that the dispute is actually closed, in that closure we want the respect of both parties, the plaintiffs and the defendants, and we want them to leave the court with the notion that they have been heard and that the dispute has been resolved in a respectful way.

When we do that, we do that for a while because those before us have done

that, then perhaps we can talk a little bit about judicial independence. But I don't know whether things are worse between us and Congress. I listened to the three congresspersons this morning, I think in Indiana we're awfully fortunate to have congresspersons who are actually paying attention to this subject. Both of our senators, who couldn't be with us, are awfully aware of concerns; and we don't get the kind of hostility from our own representatives both in the House and the Senate that others might have.

I don't see the situation the same. I think maybe if you're on the appellate court you see it a little differently and certainly if you're on the Supreme Court, you would be a little more sensitive to relationships. And maybe the elephant in the room is the George Bush decision that Congress has never forgiven them for, I don't know.

MAGISTRATE JUDGE BAKER: Thank you.

Judge Miller, how about up in the Northern District, what's the feeling there and your sense of relations?

CHIEF JUDGE MILLER: Well, first of all, I get phone calls like that, too, but they're always commending my decisions.

(Laughter)

The crackpots come out in favor.

I think you have to be careful. I think those of us who can look back over thirty-two years tend to think things aren't as good as they were in the good old days. To me the good old days, I guess, include when I was a kid riding without seat belts in the back of the station wagon, and we'd go past signs that said, "Impeach Earl Warren," and we don't see that today.

But I think what is different from when I was growing up and down through the years since then is I don't remember a time that members of Congress have campaigned against the entire judicial branch. Certainly for years while I was growing up, I remember candidate Richard Nixon in 1968 campaigning effectively against the Supreme Court and the *Miranda*[47] decision and all those decisions, but not against the entire judiciary that I can recall.

Now we can go to the bookstores and we see books about the imperial judiciary, and there's always anecdotes about some district judge somewhere having done this and isn't that horrible. And I think that is different both in tone and in substance that it's not just the folks at the top, it's also the rest of us who are trying to make sense out of and apply what the folks at the top are doing.

So I think on balance and trying to approach it with a great deal of caution, I agree with Judge Flaum.

MAGISTRATE JUDGE BAKER: Justice Shepard, from your perspective as the Chief Justice of the Indiana Supreme Court looking at the federal system, what is the impression that you get in terms of those relations? And then if you could also speak briefly on the relationship of the state court judges to the state legislature.

CHIEF JUSTICE SHEPARD: I think Bob Miller has just made an important point about the intertwining of political efforts during election periods

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47. Miranda v. Arizona, 384 U.S. 436 (1966).

and the activities of the judiciary.

I was at a meeting once in the spring of '05 in which one chief justice said to Chief Justice Marshall, "I thank you for the president's reelection." And by that he meant that the placement of gay marriage referenda in a series of strategic states altered who turned out to vote for President.[48]

So, there is a level of sophistication that didn't exist before, it seems to me, about how the judiciary can be used as a fulcrum, not because the people involved necessarily care about judges. Nobody really thought that the Ohio Supreme Court was going to insist on gay marriage, but they did think if they could get it on the ballot, it would alter how they voted for President. And that's a very novel thing in our history. I think it has a limited play, but it hasn't played out yet.

I would say my own assessment of the Congress and federal judiciary is a little less fulsome than Judge Barker. It seems to me it's hard to not simply talk about this without talking about the people. Jim Sensenbrenner isn't running the House committee anymore, and that's a net plus in terms of lowering the temperature. On the other hand, moveon.org is now running the Senate Judiciary Committee, and that's a net negative for everybody. And that's a long-term problem that I think nobody has yet figured out what to do about.

In terms of the value of the relationship, I think, and I think most of my colleagues and many of our trial court colleagues think of the other branches and our relationship with them on a regular basis. And we deem it important because, for example, they are the people who either will or will not give us the resources to improve public defender systems in our state. That doesn't mean we're not in a position to trade off a decision in Smith versus Jones; we don't have that kind of chip. But if you prove yourself to be a straight talker and you take some care in what you ask for, and when you ask for it, you say, "Hello," and "Good morning," to people and all the things we learned back in kindergarten at the right moment, you're more likely to be successful at that than not.

So, whether the relationship—we put a value on whether that's a good relationship, and the one thing we can do is be helpful to them in certain areas of administration. What are the things that they're worried about or pressures they feel? One of the most recent ones was is there anything that could be done about the sentencing scheme in the state. And judges know a lot about that, and we have been willing to participate, not in the—obviously not in the end, not in deciding what will get enacted, but we do participate in very formal ways in the conversation. That seemed to me to lead to the betterment of the republic.

MAGISTRATE JUDGE BAKER: Professor Magliocca spoke this morning about putting the Chief Justice on Capitol Hill and opening a dialogue through that process. It reminded me to some degree of what you do through the State of the Judiciary speech every year.[49] It's a little different, I think, his

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48. *See, e.g.*, Anthony Champagne, *The Politics of Criticizing Judges*, 39 LOY. L.A. L. REV. 839, 847-48 (2006).

49. For transcripts of the Annual State of the Judiciary Speech since 1988, see Indiana

proposal, than exactly what you do.

But do you think going in front of the legislature like that helps build relationships? And what is your opinion on the proposal that was set forth by Professor Magliocca?

CHIEF JUSTICE SHEPARD: I'm in favor of it. I would say that it's been a very valuable tool for us. You don't really build relationships by giving the speech. I mean, that's a little more hands—you know, you do that through things that are much more hands-on than getting up on the podium.

I've forgotten which of the three it was who said we know there's a message, but we'd flunk a quiz on what was in it. It's an incredible opportunity to be able to speak to the whole 150 at the same time and say here are the five things we're trying to achieve, here is where we could use some help, here is what we've done that we're proud of, here is our list of objectives and to know that at least for that moment they have all focused on what the needs of the third branch are and what its aspirations are.

We have tried in every way to make that event to look like the State of the Union, if you will. I think the second year I did it. I invited Governor Orr to come and listen. And since then every governor has decided that the governor would come and listen just as the Chief Justice comes and listens and the members of the court come and listen.

One of the great things about Justice Alito and a few of his colleagues is that there had been a deterioration of who went to the State of the Union. It got down to the point where only Stephen Breyer would go, and the others would have dental appointments or something.

(Laughter)

I think in the last speech there were four: Roberts, Alito, Breyer, and somebody else. I've forgotten who the fourth one was. I don't think there were five. But I thought that was a mistake. I understood why it happened, what the judgments about it were, but I think it said something favorable about him and John Roberts and others. And Stephen Breyer particularly sort of kept that flame alive by going there and sitting in the front row. The whole country is here, the diplomatic corps, the military is over in their row. That's retail politics as well. You shake a lot of hands on your way out the door.

MAGISTRATE JUDGE BAKER: Judge Barker, what do you think about the proposal set forth for the Chief Justice?

JUDGE BARKER: I was interested in the discussion, of course. There have been lots of efforts over the years. Brookings has made efforts, and other think tanks such as that, to have these inter-branch conferences and communications on a regular basis. They always peter out, and it's always because of legislative branch disinterest.

So you'll have a burden of proof in getting the legislature to express the threshold level of interest to do this, to get them there. It's got to matter to the Congress. Over the years it's been very interesting to me how scant the

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Supreme Court, State of the Judiciary, http://www.in.gov/judiciary/supreme/state_jud.htm (last visited Oct. 20, 2007).

understanding is by members of Congress about what the courts actually do, how a judge actually decides a case, what the procedures are. It's reflective of the fact that a lot of them aren't lawyers and some of the lawyers never practiced law.

But in terms of a clear understanding of what we do, it's more often missing than there. So, the first problem is that practical problem in getting the interest up to structure such a visit.

My more prevalent view and response to it was that it has the potential—we talked about this today, or some did about the risks attached to that—to be a very hard thing to stop doing once you've started doing it because then it really looks like an affront. If the Chief Justice says, "I'm not going to take any more of that. I mean I got elbowed and beaten up on, and they're asking me about cases, and they're asking me about why the Supreme Court decided such and so, and they're asking me about why we don't follow precedent, and it's just not appropriate."

So, I think that's one of the dangers that if you start it, it's going to be way harder to end it if it's not working out.

MAGISTRATE JUDGE BAKER: Any other thoughts on that proposal?

CHIEF JUDGE McKINNEY: Yeah, I would have one suggestion and that would be to say that we do have a conversation with the legislative branch, but we have it through our administrative offices and their staffers and our staffers and that kind of thing. Perhaps now is the time to convince the Chief Justice that he could go before the Congress and speak about what his administrative duties are, what cost-saving efforts the judiciary is up to, what our case loads are and what that does to both the cost of operation and the efficiency of operation, and to let them know about the Judicial Council and all of its committees. There are I don't know how many committees on the Judicial Council, and they're all up to improving the judicial branch and being responsive to the requests of the legislature.

JUDGE BARKER: Could I just add to that?

MAGISTRATE JUDGE BAKER: Sure.

JUDGE BARKER: The Judicial Conference sessions happen twice a year. It's the policy-making body for the courts, the federal courts. At the beginning of each conference session, the leadership of the judicial committees in Congress is invited to come and make remarks to the conference. I've served on the conference, so I was there, and I listened.

But I've also heard about those appearances over the years. And more often than not, certain of the legislative leaders who come to the conference—and it's a room of judges from all over the country, the chief judge of each circuit and one district judge representative from each circuit, so it's high level—they just use it as an opportunity for tirades and criticisms, saying that the judges are high-handed and not doing right by the resources that are given, spending too much money, that sort of thing.

So it's not a healthy exchange even in that structured setting. The judges typically just sort of sit there and take it. And almost always the member of Congress who's speaking leaves right after that, so there's no colloquy.

There's a lot of room for repairing the relationships here. You know, for a long time—since you said Sensenbrenner, I'll say his name out loud, too. That's who I was referring to, of course. For a long time he would not speak to judges.

He was chairman of the House Judiciary Committee and he would not speak to judges. He said he only spoke to one judge, that was Chief Justice Rehnquist, "so don't come see me," he said.

Well, that committee is the committee through which all the requests for resources go, judgeships, everything, salary; and he didn't like us, so he just closed the door. But it's hard to have a good relationship with somebody who won't let you in, and you never work out anything that way.

Just one other little tagline, and I'll stop talking. Randy touched on this. Where we see it in the trenches at the district court level, this tension is when it shows up in budgetary ways. We've had to cut back our probation departments. We've had to cut back on the clerk's office functions. Now we're talking about curtailments of judicial chambers staff, all related to the amount of money that's made available to us. The other way is by the burgeoning number of causes of action that continue to flow out of Congress without the offsetting resources to deal with it.

So we see it in really nuts-and-bolts, practical, how long is your workday ways.

CHIEF JUSTICE SHEPARD: The strategy I use for sort of the Sensenbrenner-type problem—it's a very long-term effort—is what I think of as the "back-bencher approach." Sooner or later the back bench is going to be sitting down front, that's especially true in Congress. You occasionally, you just—so who are the new kids and who do we know, who's got a relationship with this or that representative or senator? The last two years we have tried doing introductory lunches with new people; didn't work as well as I thought. I think we're going to have to re-jiggle that approach.

We have a tremendous advantage of being in the same building. Sometimes you just have to outlive them, right?

JUDGE BARKER: I'm working on it.

(Laughter)

CHIEF JUSTICE SHEPARD: Working on it. And to work back, there are obligatory communications with the leadership; they're obviously the most crucial. But next year it might be the person who's sitting three chairs away who is going to leap to the front of the crowd, and you just have to make an investment in that possibility. It's not very fancy and it takes time, but so far it's working for us.

MAGISTRATE JUDGE BAKER: Is that how you got the judges a pay raise in the state?

CHIEF JUSTICE SHEPARD: Well, Chief Judge John Baker has spent more hours on that than the rest of us put together. But a little at a time, there are a lot of people who can—you know, we have a marvelous alignment of stars, but the other thing about pay is that if the only time they see you is when you're asking for money, they achieve a vision of what you're about. What's this encounter likely to be?

So we've been very conscious about trying to find occasions where we can make ourselves helpful in ways that do not detract from our central mission, and the sentencing example is the one that is an example of that. There are other places where we try to prove that we can be good partners.

MAGISTRATE JUDGE BAKER: We'll come back to the pay raise issue a little bit later. That's a big issue obviously.

Let me switch gears. Professor Magliocca, were you taking notes here? You can still revise that article if you want.

PROFESSOR MAGLIOCCA: I can. Duly noted.

(Laughter)

MAGISTRATE JUDGE BAKER: All right. Let me switch gears on you. I want to set forth a quote from William LaForge, President of the Federal Bar Association, who wrote in a recent article, "At minimum, inappropriate criticism of the judiciary undermines public confidence in the judiciary and in judicial independence, regardless of whether the criticism actually influences the decision-making."[50]

So, Judge McKinney, do you agree with that?

CHIEF JUDGE McKINNEY: Well, I know this sounds self-serving, but yeah, I certainly do. I certainly do. And one of the difficulties that we see when we get undue criticism—and sometimes the criticism may be due for a particular instance. For example, there was an awful lot of criticism of the O.J. Simpson trial. For the longest time, even in our voir dires, we had to include a little mention of that.

The point is that when the emphasis is made on a situation like that, people don't see the 99.9% of the other cases that don't do that. So the question is, if the first chicken you ever saw had two heads, how many one-headed chickens would you have to see in order to convince yourself that that first two-headed chicken was an aberration?

(Laughter)

JUDGE BARKER: I believe that's an Edinburgh example.

(Laughter)

CHIEF JUDGE McKINNEY: I could have used goats and included Trafalgar.

(Laughter)

MAGISTRATE JUDGE BAKER: This is why I put them on the same side together over here.

(Laughter)

CHIEF JUDGE McKINNEY: But that's the point. We are all open to criticism.

MAGISTRATE JUDGE BAKER: But the comment here is inappropriate criticism.

CHIEF JUDGE McKINNEY: I understand that and inappropriate comes from not understanding what the three branches of government are up to, not understanding the kinds of things that judges do routinely, not appreciating civic responsibilities of jury service, those kinds of things. And some of those things are inappropriate, and it is a problem, and it causes a mistrust of the final closure of the case, which is not a good thing.

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50. William N. LaForge, *Judicial Independence: An Age-Old Concept Is Alive and Well but Has Contemporary Challenges*, FED. LAW, Nov.-Dec. 2006, at 3, 5.

MAGISTRATE JUDGE BAKER: Well, you were involved in the Perry Township School Board case which generated all types of press and letters to the editor.[51] Judge Barker has had her Ten Commandments cases and many others.[52] Judge Hamilton had his statehouse prayer case.[53]

Now, Judge Miller, you've never had any controversial cases.

(Laughter)

CHIEF JUDGE MILLER: I stay completely—

(Laughter)

MAGISTRATE JUDGE BAKER: Those letters to the editor, those news stories, what impact, if any, does that have?

JUDGE BARKER: Well, first of all, we read them. So any judges who say they don't read the press conference are probably spoofing you. But you look to see what the criticism is because we sense deeply that we're accountable. We're public officials, and there are things that we do that we ought to be held accountable for. If I'm not speedy enough in a decision, somebody can fairly say, "Come on, Barker, pick it up." Or if I'm not civil in some exchange, it's entirely appropriate for somebody to say, "Woo-hoo, back off a little bit on that."

But if they're saying I rigged the system to get a particular case because I have a particular bias—and early on when I got the Indianapolis pornography ordinance case and I was the only woman on our court, a lot of people thought I had engineered that, that I had something I wanted to say in that context.

CHIEF JUDGE McKINNEY: Actually, I engineered that.

(Laughter)

JUDGE BARKER: I know that's not true because you were in Johnson County at the time, and you've never read a newspaper.

(Laughter)

CHIEF JUDGE McKINNEY: Guilty.

(Laughter)

JUDGE BARKER: Or when they say that you do something because you favored the lawyers on one side or the other, or when they say something that is entirely related to the merits of the case that a jury decided. I may be the trial judge, and the jury made the decision, but it gets assigned to me, those turn out to be personal attacks on the way the job of judging is being done.

It's like Justice Alito said today, the criticisms that are unjust and the criticisms that are unfair and inappropriate are the ones that go to the heart of the institution. When you undermine the people who are trying to effect the goals of the branch or the institution, you're diminishing the ability of the branch to perform the entrusted responsibilities.

So those are the ones that are unjust. Those are the ones that after you've read them, you throw the newspaper down and you say, "Oh, stupid." But when

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51. Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014 (7th Cir. 1997) (appealing decision of Judge McKinney).

52. Kimbley v. Lawrence County, 119 F. Supp. 2d 856 (S.D. Ind. 2000); Ind. Civ. Liberties Union v. O'Bannon, 110 F. Supp. 2d 842 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766 (7th Cir. 2001).

53. Hinrichs v. Bosma, 410 F. Supp. 2d 745 (S.D. Ind. 2006).

it comes through with a criticism that you ought to hear, you hope to have enough detachment to hear it.

CHIEF JUDGE MILLER: It's difficult because we live in an age where political discourse, the partisan political discourse, has become more about motive than message. That if one side doesn't like what the other side is saying, we attack their motive for saying it or their moral authority to say it more so than any time I can remember.

And maybe that's fine when it comes to partisan politics, but when you do it with respect to a judge, now you, as Judge Barker was saying, go to the heart of the system. If I'm accused of making a wrong decision, that's fine. Heaven knows that people tell the court of appeals that every day of the week that I made a wrong decision. If it gets in the paper that somebody said that, that comes with the territory. I'm a public official, and you've got to have some degree of thick skin.

But if they say I did it because of the politics involved in the case or I did it because of the people involved in the case, now you're undermining faith not just in me, but in the system. Because the people that are out there and are learning to distrust these people with bad motives in Congress and in the legislature and in the Justice Department and the White House and all, they will draw that conclusion, too, and lose faith in the system.

It's hard to explain to anybody, but I really do think it plays out differently if you attack a judge for motives rather than the decision, than if you attack a senator, congressman, candidate, whatever. That may sound self-serving and probably is.

MAGISTRATE JUDGE BAKER: Do you have any additional thoughts?

CHIEF JUSTICE SHEPARD: Well, just two. One is the question is not whether there will be unfair criticism. The question that's important to me is what can we do about that. One little thing that we can do, and I think our judiciary does a superb job at this, is to be careful about what we say about each other. That is to say, what do dissenters say about the majority opinion? What does the majority say about the dissenters? What does the writing judge say about how the trial judge acted on this particular point? It's leading by example. That's the honorable thing to do anyway, but it is a contribution towards a healthier dialogue.

But the tougher question is what do you do about all those other actors, or is there anything you can do about the other actors? And I've come to the conclusion that your chance of controlling them is minimal. But you might be able to make a contribution towards how people hear it. How does the public assess unfair criticism? And sometimes that can turn out very well.

I mean, I think the score in the Terri Schiavo case was courts fourteen, Congress six. In the end the judgment of the American people was that the judges did the right thing, both state and federal, and that why in the world is the Congress of the United States out trying to legislate in a particular case in Florida.[54]

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54. Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fl.), *aff'd*, 403 F.3d

But in the long run, we're working on things that will help the people of our state understand the system better. We have a very energetic public education program that's been growing in the last three or four years. And the data—some of the same polling data that Professor Geyh referred to earlier—indicates that level of knowledge among the average citizen affects whether unfair criticism resonates or doesn't. Fair criticism is a whole different ball game. I take it, read it, assess it as we might.

But the one thing we can do is help our fellow citizens have a stronger basis on which to figure out whether this is bogus criticism or legitimate criticism, and that's part of our job. It's a way of, it seems to me, trying to build a better base for judicial action and legal action. Judges and lawyers are in the same boat on this point.

MAGISTRATE JUDGE BAKER: You've touched on two things that I want to follow up on. One was the Terri Schiavo case,[55] and the other one was the way in which judges interact with each other in writing their opinions or in other ways that judges interact with each other.

One of the things that was very publicized recently was the Wisconsin State Supreme Court race in which a couple of the candidates for the Wisconsin Supreme Court played out in a very bitter rivalry in the paper accusing one of being a liar, the other one accusing the sitting judge of having a conflict of interest on cases, which didn't do a whole lot to help hold the judiciary in a high regard.

My question is to the panel: How can we expect legislatures to treat judges appropriately if things like bitter dissents and opinions or the way judges treat each other publicly is so negative?

Judge Barker?

JUDGE BARKER: Well, the tone matters. It's just what Randy said. How you say that you disagree with a particular principle is going to carry weight, and so you have to be careful.

I haven't served on an appellate court, except by designation a few times to the Seventh Circuit, and the problem didn't really present itself. But I can tell you in the district court that we have our own mores for dealing with each other, even though we don't jointly decide things. For one thing, we never criticize each other for a particular opinion. We may sort of joke about, oh, yeah, the Seventh Circuit didn't get it that time, you know, or something like that, something reinforcing.

But if we have a disagreement, we don't call down the hall and say, "Jiminy Christmas, what were you doing on that?"

Actually, I have a perfect example from my own early days as a judge. I was trying a case to a jury, and the lawyers had asked for a special verdict. And I hadn't had any experience with special verdicts. I didn't have any views about special verdicts. I had no experience about special verdicts.

So we got up to the noontime, and I called down and I was able to catch

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1223 (11th Cir. 2005) (per curiam).

55. *Id.*

Judge Dillin. I said, "Judge Dillin, have you ever used a special verdict?" He said, "One time." He had already been a judge for a hundred years.

(Laughter)

He says, "One time." I said, "One time?" He says, "Yep. Regretted it ever after." And I said, "Well, how come?" And he said, "Well, it usually prolongs the deliberations. It threatens to have an inconsistent verdict as a result. You're asking questions often that the jury doesn't need to resolve in order to have some logic in it. So it gives them too much work to do." And I said, "Yeah, yeah." I said, "Well, listen, I'm trying this case about," whatever it was, "employment discrimination, and I've got"—and he says, "Of course, I don't know about your case. I don't want to know about your case. I'm just telling you, one time with a special verdict."

(Laughter)

And I thought at the time, you remember how Judge Dillin could sometimes make you walk away thinking, "Oh, I'm really pretty stupid." So it hurt my feelings for about fifteen seconds, and then I thought, "How wise is that!" He wasn't going to let me invite him into my decision-making. He said that was mine. And that was wise.

MAGISTRATE JUDGE BAKER: Anyone else want to pick that one up?

All right. We heard Professor Geyh earlier today ask whether the public really cares, and I think I heard him say yes but no, yes and no but ultimately yes.

JUDGE BARKER: That's why he's a professor.

(Laughter)

MAGISTRATE JUDGE BAKER: Exactly. That's why we asked him to talk today.

But I'm curious what our panelists think about that. You all come into contact with witnesses, prospective jurors all the time. You have a sense of whether the public cares. Judge McKinney, you've been known to call the prospective jurors your ambassadors of the judicial system. Does the public care?

CHIEF JUDGE McKINNEY: I was tempted to have the court reporter read back what Professor Geyh said on that, but I don't think he got it all.

(Laughter)

Sure, I talk to those jurors every time. Every time there's a decision I go in and talk to them, and there are a couple reasons for it. One is because they're pretty emotional at that point, and they need closure before you turn them out on the street, and you want them to feel comfortable with what they've just done, whether you agree with it or not. You want them to go back out into their neighborhoods and explain that what's going on there at the courthouse is important, and that the lawyers are trying their best to give you what you need to make a decision. I think that's extremely important as an educational tool because I think people really do care what goes on at the courthouse.

That's one of the problems with the diminishing jury trials: You get fewer and fewer opportunities to introduce this wonderful jury service, this wonderful exercise of civic responsibility to individuals because they respond so well to it. They do such a wonderful job trying to understand what's going on, even in the more difficult cases.

So I don't know that they worry about judicial independence, but I do think people are concerned about the level of fairness that goes on at the courthouse. They do read all the aberrations in the newspaper every time there's some huge verdict. The paper doesn't generally go on and talk about how much of that verdict was later reduced, or as we heard this morning, they don't talk about how many times McDonald's got warned about the heat of their coffee, they don't read about that.

But I've had more than one juror after we're done say, "You know, I'll read those newspaper articles differently. I'll look at this differently when I see it next time, and I'll have a little more respect for what those people had to go through to arrive at that decision."

MAGISTRATE JUDGE BAKER: Do you have many members of the public come down and watch your court proceedings if it's not a high-profile case? And I'm not talking about the Boy Scout troop that's coming down there for a civics lesson. Do you have many people stop in on you?

CHIEF JUDGE McKINNEY: Not since I quit hearing divorces.

(Laughter)

MAGISTRATE JUDGE BAKER: You don't usually have many, do you?

CHIEF JUDGE McKINNEY: No, we don't. No, they took the benches away. People are doing something else, I guess.

MAGISTRATE JUDGE BAKER: They still have benches but—

CHIEF JUDGE McKINNEY: I meant outside the courthouse. They don't hang around the courthouse like they used to.

MAGISTRATE JUDGE BAKER: Judge Miller, how about the Northern District? Do you think the people care? And do they come watch you do your job?

CHIEF JUDGE MILLER: They can't get past security for the most part. The lawyers are fortunate to get through.

MAGISTRATE JUDGE BAKER: They can if they have their ID and they don't have a camera, right?

CHIEF JUDGE MILLER: That's right. And are willing to leave their shoes behind and that sort of thing.

(Laughter)

I think people care very much that the court system is working. I really think that's one of the biggest problems we have right now in the sense that everybody wants the court system to work, but I think we're divided very much, at least in northern Indiana, and, from what I can tell, all over the country, as to who believes it is working well. The minority community believes it is not working well and has a diminishing faith particularly in the criminal justice system, but the civil justice system as well.

But I agree with Judge McKinney as far as people who come to court, who we can get there. If we can get them there for jury service or for some other role in the courthouse, they want very much for the system to be working, and they care very much that the system has what it takes to work.

So, yes, I do think to the extent they understand judicial independence is tied in with the courts operating appropriately and functioning well, I think they're very much in favor of it. My concern is the division as to who thinks it is

working and who thinks it isn't.

JUDGE BARKER: Tim, we use jury questionnaires, and the jury sends them back after their service. Often I talk to them, too, but they'll send back these paper evaluations of the lawyers and the process. Almost all of them express surprise that it was a better experience than they expected, and they're appreciative of the court personnel and the attention that they get and that it was meaningful.

I have a little copy of one of them that I got back that says about jury service, "When I came in, I really didn't want to serve. But afterwards, I was so glad I did." And I read that to the juries when I'm impaneling them, saying "This is what one of your fellow jurors said."

It occurred to me this morning, when our three congressmen were here, how true it is for congressmen and, I think, for judges as well that while people have this sort of generalized negative dislike of Congress, they like their congressman. And it's true of judges, that the people may not be all so shot up with the judiciary and the court system and everything, but as soon as they have a relationship with a judge who doesn't wind up in putting them on the spot or something, they tend to like that individual judge whom they've come to know.

And it's true for our magistrate judges, for our bankruptcy judges who are on the front lines and see way more people than we do in the district court. I mean, they really get first-class treatment when they get the full attention of those judicial officers to help work out a real problem in their lives.

MAGISTRATE JUDGE BAKER: I definitely see that.

Justice Shepard, what about from the state court perspective?

CHIEF JUSTICE SHEPARD: Well, I was just going to say, going back to the last question you had, that up against these experiences one must match things like the Wisconsin election, you know, where millions of dollars are spent to convince 51% of the voters that the other guy is a crook. By the way, I saw the other day that the other guy did plead guilty—the other gal pled guilty and proposes to take a reprimand from the court on which she now sits.

Surely it's the case that the spending of millions of dollars in that way, and, I'll argue later if we ever get to it, the same principle applies in confirmation hearings in the federal system. To the extent that those food fights are absorbed by the voters, a lot of the good experiences that they have are diminished. And the campaign example, or the high-visibility confirmation hearing example, has the capacity to kind of wash over all of these efforts that we make at showing—we've had a very good experience showing jurors introductory films. Here is your role, we now have a really very high class video that we use, we're about to revise it, to cover changes in the jury rules.

But I'm not very sanguine about public attitudes in general because of where I think we're headed on elections and confirmations.

MAGISTRATE JUDGE BAKER: All right. I told you I wanted to follow up on two things you said, the other one was the Terri Schiavo case[56] which obviously drew a lot of publicity.

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56. *Id.*

Tom DeLay, former Representative Tom DeLay, made a comment after the Schiavo case and I'm going to quote part of that. He said:

> The legislative branch has certain responsibilities and obligations given to us by the Constitution. We set the jurisdiction of the courts. We set up the courts. We can unseat the courts. We have the power of the purse. We have oversight of how we spend their money. All of these are oversight tools.[57]

Pretty strong language from Representative DeLay, and something I want to explore with our panel.

Judge Miller, to what extent would you either agree or disagree with Representative DeLay? And if you don't completely agree with him, what is the proper oversight role of Congress as it relates to the way the courts are run?

CHIEF JUDGE MILLER: Well, I don't think you can disagree with any of those single sentences. Each of those sentences are true. But to the extent they come about then and because of this decision we will exercise those powers differently, that's where I think you get the threat to judicial independence.

But it's true, they do have all the—they confirm us, they can impeach us, they can reduce our funding. They can't reduce our pay, but they can certainly change our staffing and take away probation officers and all that sort of thing. So, all those things are true.

I think the implicit threat, though, is that "and, therefore, if they do not decide these cases as we believe they should," we being whoever has 51% of the legislature at the time, "that we will punish them accordingly." That, I think, most people would not agree with, most American people would not agree with, but that's the implicit—

MAGISTRATE JUDGE BAKER: So, what's the way to do that? They take away your funding and do this and do that to you, but they just don't tell you it's because of a certain ruling you made? If they have that authority, how do you know when they're exercising it properly and when they're not?

CHIEF JUDGE MILLER: I haven't had to make that decision yet.

MAGISTRATE JUDGE BAKER: Judge Barker, what are your observations in that regard?

JUDGE BARKER: Well, like so much Tom DeLay said when he was in public office, I believe it was intended to intimidate the judges. There's a reason, I suppose, he's gone back to being an exterminator as his profession.

(Laughter)

He was never a fan of the courts or the judiciary, and he wanted judges to know that. So he was doing what my mother used to regard to as unseemly behavior: He was "Big Ike-ing." He said, "I'm bigger than you are. I've got more power than you do." That means, in a bullying way, "you better do what

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57. Rick Klein, *DeLay Apologizes for Blaming Federal Judges in Schiavo Case but House Leader Calls for Probe of 'Judicial Activism,'* BOSTON GLOBE, Apr. 14, 2005, at A9, *available at* http://www.boston.com/news/nation/washington/articles/2005/04/14/delay_apologizes_for_blaming_judges/.

I want you to do."

Now, the legislative branch in this tripartite, balanced, checks-and-balance system, the legislative branch has a special obligation to the judiciary branch, which you've heard described as the weakest branch. We don't have any constituencies. Sometimes we can get lawyers to speak for us, but we're very few people and we don't have the power of the purse. We just do this one task that's assigned to us by the Constitution.

The legislative branch has a particular responsibility to make sure that all the branches of government function well and properly. And the atmospherics come into play between and among the branches when you talk about common problems, and you can make a candid disclosure to one or the other branches about what you need and what's not being served or serviced properly by the relationship with the other branches. It's got to be open; it's got to be collegial. It's got to be with everybody moving essentially in the same direction towards better government.

So when you hear a diatribe like that, it's like any other fight. Those are just fighting words. He's right technically. Yeah, Congress has all those powers, but their obligation is to use them to better government across the board, even the judicial branch.

MAGISTRATE JUDGE BAKER: Do you have something else you wanted to add, Judge McKinney?

CHIEF JUDGE McKINNEY: Just to echo what Justice Shepard said about how judges ought to treat each other. I think we have to be careful what we say about Congress. We don't want to have any public writings that would be interpreted by a congressman as I can interpret what Representative DeLay said. We need to be a little more careful with that.

MAGISTRATE JUDGE BAKER: There was some discussion this morning, quite a bit by the representatives, about jurisdiction stripping. We've talked about a couple of those bills that were proposed and they're in various phases. But I just want to take a minute to talk about those and see what the impact of those are.

There have been several, some that are pending now, some bills that have been pending in the legislature last year. A couple that are pending now would include the Pledge Protection Act of 2007,[58] pending in the House. The goal of that legislation was to limit judicial interpretation of the Pledge of Allegiance by restricting jurisdiction over those cases to the District of Columbia courts and the U.S. Supreme Court.

There was the 2007 We the People Act,[59] which would limit the federal courts' jurisdiction in cases involving religious freedom, sexual orientation or practices, or same-sex marriages, and would also make decisions by federal courts on these issues non-precedential on state courts.

There was the Marriage Protection Act,[60] which would have defined the

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58. H.R. 699, 110th Cong. (2007).
59. H.R. 300, 110th Cong. (2007).
60. H.R. 724, 110th Cong. (2007).

federal courts' jurisdiction—excuse me, would have denied the federal courts' jurisdiction to interpret portions of the Defense of Marriage Act. There was also the Constitution Restoration Act,[61] which Representative Pence discussed this morning as you may recall, which would have prohibited the United States Supreme Court and the federal district courts from exercising jurisdiction over matters involving a government entity or official who acknowledged God as the sovereign source of law, liberty or government, and would have prevented U.S. courts from relying on the laws or policies of foreign governments when interpreting the Constitution, among other things.

These are just some of the laws that are either pending in the House of Representatives or have been proposed in prior legislatures. But, to my knowledge, those laws have not passed. They have advanced; some have been approved by the House and died in committee when proposed in the Senate.

But my question to the panel is: Are these types of legislations appropriate exercises of congressional authority? Is it mere saber rattling? Is there any realistic possibility that this type of legislation would actually be passed into law?

Judge Barker.

JUDGE BARKER: Well, it's saber rattling, but it's not mere saber rattling. All of these issues are hot-button issues. They're issues about which there is a lot of disagreement within the body politic. And people feel very strongly about these issues; these are not things that people are neutral about.

So when a court comes out with some interpretation of the law and hands down a decision that strikes some people as wrong or offensive or un-American or unreligious, whatever the reason is, to be able to come back with a bill that basically pulls the jurisdiction out of the federal courts to resolve these most heated of all disagreements and issues, I always wonder who they think is going to resolve these things? I mean, if it's not the courts, are we just going to let people duke it out on the streets and say for example about abortion? Pro life? Pro choice? Or are we going to bring these issues within the civilized forums and let them be resolved under the rule of law in accordance with law?

It would be so much better, I think, instead of coming up with some proposal to pull these out of the courts to try to deal in a more nuanced way with the underlying struggles so you can actually craft a compromise. We are a very large and diverse country, and we have to all try to live together under the rule of law. And that means there has to be some very thoughtful legislating going on that says, "Here are ways that we can craft a midway point so that people can have the maximum amount of freedom to live their lives and pursue happiness," etc. When court-stripping bills get introduced, it's a distraction and it's counterproductive because it pulls you away from doing the hard work of nuanced legislation that takes into account this great diversity.

The Feeney amendment[62] sort of stands in the minds of all of us district

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61. S. 520, 109th Cong. (2005).

62. Protect Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 24 U.S.C.).

judges as the best recent example of this problem. Mr. Feeney is a congressman from Florida who introduced as a rider to a bill to limit federal district courts' sentencing discretion for cases involving sexual predators or child pornography kinds of cases; it was intended to reduce departures. The provision said to the district court judges you will operate under sentencing guidelines, but in these cases you can't depart downward.

There were no hearings. There was no discussion. Nobody called up the Judicial Conference of the United States and the Criminal Law Committee or the Sentencing Commission and said, "What do you think about this? How would this work? How would it impact the sentencing function?" The proposal simply showed up on the House floor. It slid through and was enacted and was wired over on the other side, and now that's the law. That's how it came about.

We don't operate under the sentencing guideline regimen as such any longer, which has neutralized the effect of the Feeney amendment. But that's how it happens, sort of in the dead of night.

MAGISTRATE JUDGE BAKER: Judge McKinney, do you have something else to add on that?

CHIEF JUDGE McKINNEY: I'd just say this. In the past we've had some jurisdiction-stripping legislation that I thought was pretty wise. Black lung, for example. You didn't hear black lung cases in the federal courts; those were all assigned to administrative matters, and that was it. I was looking forward personally to seeing that done with asbestos, but alas, that didn't occur. Now, if we want to do some jurisdiction stripping on a Sunday afternoon, that would be the kind of thing, it would seem to me, that we ought to look at it.

It's when we're double dribbling and traveling through the first four amendments to the Constitution when we get into some difficulty. So, I don't know, I wish them luck, and I hope I don't get any of those.

MAGISTRATE JUDGE BAKER: Justice Shepard, have you followed the debate at all in the jurisdiction stripping?

CHIEF JUSTICE SHEPARD: I do. And while I agree with what my friends have said, I really think this is a kind of an insider baseball topic. If you were to try to gather a group of citizens to concern them with fair and impartial courts and you led off with a discussion of jurisdiction stripping, you'd have made a mistake.

It is distracting, and it does happen in ways that are—but it doesn't happen very often. If you think about the interplay between Congress and the courts on jurisdiction, it's, I think, ironic to contemplate that *Marbury v. Madison*,[63] that great historic moment, is one in which Congress, the Court said, tried to give the courts too much power.

So do they have the authority to expand and contract in certain ways? Yes. Is it a good idea? Maybe some days it is, maybe some days it's not. Mostly it doesn't happen.

But it seems to me the real downside of it as a topic is that it has the same characteristic that Professor Geyh said about the term judicial independence. It's

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63. 5 U.S. 137 (1803).

a kind of a distancing proposition. It does not communicate to our fellow citizens what it is they have at stake in these discussions because it's a technician's topic. It doesn't tell them one way or the other whether they're going to get a fair shake when their brother gets arrested on a drug charge or when they've got a divorce or when they have a civil rights complaint. And the way we talk to them, the way the profession as a whole talks to them, is an important part of how we ought to try to conduct ourselves.

JUDGE BARKER: Yeah, but, Randy, what if the issue is not a divorce or an assault or something, but it's the Pledge of Allegiance or it's a flag issue and somebody feels strongly about that and they come knocking on the door of the court? I agree with you that court stripping and the way we talk about it is "insider baseball," but it has implications that go much wider.

So that citizen, when he got to the court and found out there was no protection for his views, would think that that was probably as important as his divorce.

CHIEF JUSTICE SHEPARD: I'm happy to say that the courts of general jurisdiction down at the county courthouse would be open to them on almost any of those claims. But I guess my real question would be, what's your second example after the Feeney amendment? See, it's worth contemplating, but it's sufficiently rare as compared to some of the other things we've already discussed that are, in fact, out there moving people's attitudes pro and con.

JUDGE BARKER: But since it is rare—I hope this is okay if we talk over you, Tim.

MAGISTRATE JUDGE BAKER: Oh, yes.

(Laughter)

JUDGE BARKER: If it is that rare, why are the legislators doing it at all?

CHIEF JUSTICE SHEPARD: Because it's one of the few things they can think of.

JUDGE BARKER: Exactly. That was my point.

MAGISTRATE JUDGE BAKER: All right. Well, let's move on.

(Laughter)

CHIEF JUDGE MILLER: Could I just add one point? And that's to follow up on what Randy just said. Congress can close the doors to my courthouse and the doors to the Seventh Circuit and possibly the doors to the Supreme Court, but the United States Congress can't close the door to the St. Joseph County courthouse.

When they want to keep me from deciding same-sex marriage cases, it was the Massachusetts Supreme Court that decided that, not a federal court. What these bills will do is that you'll be able to have same-sex marriages in Massachusetts, but probably not in Texas. On the other hand, in Texas you can probably pray before the football game, but not in Massachusetts. You will have these federal constitutional rights—federal constitutional rights—meaning different things in different states.

Your question was, is it appropriate? And I agree they've got the authority to do it, and sometimes we ask them to do it, like black lung or diversity jurisdiction back in the days when we had too many trials. But is it appropriate? I think that becomes the issue. They can't close the doors to all the courthouses,

but they can close the doors to the courthouses that can provide some degree of uniformity from coast to coast.

MAGISTRATE JUDGE BAKER: All right. Let me switch topics, although I'm going to stay with Justice Shepard on this next topic because he mentioned previously that he wanted to—

JUDGE BARKER: I'll help him, though.

(Laughter)

MAGISTRATE JUDGE BAKER: —he wanted to talk about the confirmation process a little bit. We heard from Justice Alito this morning who described his confirmation process as the three most difficult months of his life, going so far as to make an analogy to climbing Mt. Everest with dead bodies along the mountainside. So, that's pretty serious stuff.

During Justice Ginsburg's 1993 confirmation hearing, she was praised for her candor in answering questions about current legal issues, her views on stare decisis, constitutional and statutory interpretation, her personal reactions to controversial issues, and her opinions about resolution of issues in criminal and other areas of the law. However, notably, Justice Ginsburg refused to answer questions about unresolved issues that may come before the Court. The approach has been followed by subsequent nominees during confirmation hearings.

Justice Shepard, do you agree and do you believe that the confirmation hearing is an appropriate forum for inquiries about how a candidate would rule on specific issues? When you answer, you can also go ahead and elaborate on the other issues about confirmation I know you had on your mind.

CHIEF JUSTICE SHEPARD: Well, it can be and is and the Samuel Alito example is—ought it to be is the question. Senator Schumer was heard to say after the end of the Supreme Court's last term, "There will be no more Alitos." What he meant by that was, "I'm not going to let anybody get through the Judiciary Committee who doesn't make me more tangible promises than Judge Alito did when a nominee."

Now, the underlying idea of that is nobody—I attribute this upfront to Professor Bode. If it came to pass that you could not be confirmed unless your views of the Constitution suitably aligned to at least sixty members of the Senate, what kind of judiciary would we have? As Pat says, the Constitution was designed to protect us from that crowd and to circumvent its ability to take certain actions with respect to our day-to-day lives, like the Fourth Amendment.

If you can only be confirmed if you are prepared to make certain pledges about how you will interpret the Fourth Amendment, then the judiciary isn't a place where you can find refuge from statutes or actions taken by the executive branch. That's why Senator Schumer's declaration is so dangerous. It says, I want to know more. I'm sorry to say Senator Specter allowed this, as how he was going to go back through the transcripts and try to determine whether Judge Alito, Justice Alito, had broken certain promises that he made to the committee, is the way he put it.

This is a door that will swing both ways, you know. Once both parties legitimate the notion that you can't get past me unless I know that you're going

to vote to support *Roe v. Wade*[64] or to reverse it, then the Court is just another version of the Congress of the United States. It no longer has that sort of governor quality to it. It's no longer a weighty third place.

This is very like what's happening in state judicial elections. The striking down of various state judicial codes that restrain what people can say in elections causes the Wisconsin example, and it causes the Michigan example. And it did cause things like that where millions of dollars are raised, and there is an insistence on laying out policy positions about this or that, the result of which is that what the definition is of the law in that jurisdiction is decided in the ballot box in that wonderful environment of sound bite commercials. That's real good if your candidate won; but if your candidate didn't, you're just out of luck. Just wait for the next election, maybe you can elect a different judge.

But that's why the notion of pledges or promises either to get elected or to get—you know, there was a discussion in California about whether to convert from the retention system to confirmation. And the appellate judges in California looking at the federal confirmation process said, "Thanks, I'll stick with the public. I can go out and talk to them." And said, "We've decided we don't want to do confirmation in our legislative branch."

There are a lot of people in the Congress who understand this, it seems to me. Most of the district judges who have been ruling in state code cases do not, and they don't believe that they have anything at stake, and they do. So, I regard this as kind of a self-inflicted wound. I haven't yet heard how we're going to get out of it.

MAGISTRATE JUDGE BAKER: Judge Miller, what are your thoughts on that topic?

CHIEF JUDGE MILLER: I agree with what Chief Justice Shepard said. I think what the public often forgets and the legislature more often forgets is that when it comes to constitutional litigation, they are the democratic branch, we are anti-majoritarian. Our Constitution says that no matter how many people vote for a law, you can't take away the right to free speech, you can't establish religion; we can go down the line. We are the ones who have to say, "no, you're the majority in the Senate, you are the majority in the legislature, but it can't cross this line," and there's always going to be that tension there. Yet I think when you're into the confirmation hearings, obviously if it takes sixty votes, you effectively have to agree with the majority and promise to vote the way that day's majority wants you to vote; you're giving up that anti-majoritarian position that the Constitution requires you to take in certain types of cases.

MAGISTRATE JUDGE BAKER: Any further thoughts on confirmation?

CHIEF JUDGE McKINNEY: I can't improve on those comments.

JUDGE BARKER: I do want to add just one thing. I can't improve either, I just want to add something.

I didn't hear Justice Alito comment on—it would be tacky to say it was a complaint—but to comment on the questions that were asked of him. He didn't. I mean we remember that. We remember that there were these efforts made to

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64. 410 U.S. 113 (1973).

sort of push him out of his refusal to say how he would decide a particular controversy; we remember that. But what he was talking about was the process of nomination and confirmation and what a feeding frenzy the media creates and how it deprives a nominee of any ounce of privacy that he might otherwise want to try to preserve.

And my experience is that it's—remember in times past they would look at the VCR rentals and your library card usage? They would go around trying to find somebody who had something bad to say about you so that the media would have something to talk about or the opposing senators on the committee would be able to develop that point.

A long time ago when there were openings on the Seventh Circuit that were to be filled by Indiana judges and lawyers, I was enlisted at various times to see if there was somebody in southern Indiana, in our bar here in Indianapolis, in the Southern District. We've finally got three fine judges from the Northern District to serve, but I was asked to try to go around and see—I was on the district bench at the time—if there was somebody who would like to go on the Seventh Circuit from southern Indiana. It was at a time of really ugly confrontations on nominations. You remember the gauntlet that Dan Manion had to run to get confirmed. And I must have talked to ten or twelve lawyers seriously about it, not just, you know, while standing on a street corner. To a person they said, "Are you kidding? I wouldn't go through that process for anything, and I sure wouldn't go through it for that money."

MAGISTRATE JUDGE BAKER: The perfect segue into judicial salary. Thank you, Judge Barker.

Let's talk about that. There's really only about ten minutes left in this presentation. Now, my guess is there might be some questions out here, and I want to give an opportunity for some questions. Let's do one more topic on judicial salaries and open it up to any questions because it's not very often that you get a panel like this, and I want to give you an opportunity to ask any questions that you have.

There's a bill pending in Congress, in the Senate. It would be a substantial pay raise for the judges. Of course, I'm all in favor of that; I want to make that clear. But I think we talk about a substantial raise, and as we talk about this, I think it's important that you talk about exactly what it is. So, let's look at the numbers.

The Senate bill introduced by Senator Leahy would increase the annual salary of district judges from approximately $165,000 to $247,000, and would increase the salary of the Chief Justice of the United States Supreme Court to approximately $318,000.[65] Now, you contrast that with the median household income of somewhere around $46,000, so I can't make this question too much of a softball. The question is why do judges deserve that much of a raise?

Judge McKinney, what do you think?

CHIEF JUDGE McKINNEY: Well, I can just say it will buy a lot of two-headed chickens for that much money.

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65. Federal Judicial Salary Restoration Act of 2007, S. 1638, 110th Cong. (2007).

(Laughter)

It's a struggle to say to my fellow Edinburghians that I'm worth 260,000 bucks when they're driving old cars and complaining about the price of gas and that kind of thing. The truth of it is—well, it's just difficult to deal with. But we do have what we heard this morning; we are fortunate enough to be in wonderfully responsible positions in the government. And we do represent a third of the government, and our responsibility is to resolve disputes, and that dispute resolution system is the envy of countries all over the world, and we are the front-line representatives of that institution. To that extent, as you look at who those representatives are and ask how much are they valued by the public, perhaps 260 is not such a horrible number. On individual levels, it can be hard to discuss, but on the broader picture of what the court does, what it's expected to do and the role it plays in our society, perhaps that's not such a bad number.

MAGISTRATE JUDGE BAKER: Well, the Federal Judges Association has been in the forefront of supporting and advocating on behalf of a pay raise.

Judge Barker, as president of that association, can you speak to the benefits of the bill?

JUDGE BARKER: Yes, I know maybe too much about this because this is a primary undertaking of the Federal Judges Association because we see it as so closely linked to issues of judicial independence. It has to do with what kind of judges do you want? It can't be a debate of whether Sarah Barker is worth it. It has to be a debate about what kind of judges do you want to make the decisions that are entrusted to the federal judiciary.

You'll lose the battle if you do it on the basis of individual personalities and where they live. I suppose, you know, a judge who lives in—pick a place—you know, Butte, Montana isn't going to have the cost of living and so forth and the competition among the bar that you'd have in the major metropolitan areas. But we provide salaries for judges across the board, and they're way out of sync. It's happened because of the problem of linkage, that's actually the word of art, because Congress has linked their salary increases to the judges.

You heard Congressman Hill today say, "If they get it, I get it." Then you heard Congressman Ellsworth say, "No, I made a political promise that until the budget is balanced I'm not going to take a pay raise."

So in the meantime the judges are whipsawed because of this, and the cost of living keeps going up, the professional salaries keep going up. I don't have to repeat what Justice Alito said today about the disparities between judicial pay and everyone else whom you would regard as comparable: deans of law schools, judges in other countries of comparable responsibility and standing. So it's a huge issue.

But some of the congressional representatives want to keep it linked, although I have to say that that's a matter of lesser influence these days. We're working daily, and that's literally true, daily, on this Senate bill, and we're about a week away, we think, from having a House bill put in, to move them through in this session of Congress. It takes a lot of talking and strategizing.

But the Chief Justice says, and Justice O'Connor says, and Justice Kennedy says morale is at an all-time low in the federal judiciary, and of course, in their experience, they're right. It's because we're not able to make this case clearly

enough to get it through the political branch. I must say, I hope you'll help us if you get a chance, but we're closer than we've been for a long time, but it's still a very steep hill to climb. And it's a very important issue to judges all over this country.

I had a judge call me two weeks ago and he said, "Sarah, I know you're working on this. I know you're working hard. We're making progress, etc., but I can't hang on much longer." He's in D.C., and he's got kids going to college and a higher cost of living there than we do here in Indianapolis. "How long do you think? Do you think it's going to happen? Can I hope that it's going to happen by January 1?"

And these are the hallway conversations. These are the conversations that judges are having. Another judge told me just yesterday, so-and-so judge is not going to last past the end of the year. It's another judge, I know that person is leaving.

We've had record numbers of departures from the federal judiciary, which is also a statistical fact. It didn't used to happen that way. Once you became a federal judge, you pretty much hung on. But Justice Alito painted the picture pretty accurately today with the numbers.

MAGISTRATE JUDGE BAKER: Thank you.

Justice Shepard, you are probably the most visible face on the pay raise that the state judges recently received. Other than a bigger paycheck that you now receive, can you speak briefly in closing on this topic to some of the other benefits that the pay raise has resulted in?

CHIEF JUSTICE SHEPARD: You know, when I saw this topic on our list this afternoon, I wrote, unlike all the others, I wrote a single word, "Morale." It's very hard to quantify whether that matters to everybody else. Does it matter to litigants? Does it matter to lawyers?

I've been to a lot of luncheons like the ones that Justice Alito mentioned in the courthouse in Trenton every Friday. I guess we are now happily at a moment where not only have we achieved a very substantial pay raise, but our General Assembly and the Governor have put into law a system that, if we can hold on to it, will make us relatively well over the long term. It will help keep us from this cyclical business. I mean, what happens is if you don't get it this year, and you don't get it next year, and you don't get it next year, all of a sudden the number is so big that the size of the number itself is a part of the political problem. With some luck and care and tending, that will not be a part of our future as it had been a part of our past.

But I would say in the state judiciary that, as I judge the change in morale, it is that judges have found the energy and the inclination to be interested in all sorts of very productive things. You can call a meeting and say, "Let's do something about the problem of court interpreters," or, "Let's put a committee to work on what the graying of America is going to be like once all the baby-boomers hit the retirement system and the nursing homes," and so on. Let's put a committee together and talk about that or any other variety of very fruitful and productive sort of things. And you get a very much more affirmative sort of response than you did back in the period when everybody knew that they were going to have to go home today and say to the spouse or the children, "How are

we going to make it?"

In that sense it's made the court system a much happier place to work and a much more effective place to work where everybody is not thinking about that as much anymore, but it's still a matter of interest and concern. Our judges are still not quite confident that this is for real, and it's only when it actually shows up in the paycheck that they believe it. But so far it is real, and it has had the effect of allowing people to have a more forward-moving attitude about what it is they're trying to achieve.

MAGISTRATE JUDGE BAKER: Thank you. We have maybe a minute or two. Are there any questions for our panel?

Professor Grove.

PROFESSOR GROVE: I wouldn't gainsay the importance of some significant raises for federal judges. It seems to me 50%, which is what's being proposed in the Senate bill and I thought there was House legislation mirroring that already.

JUDGE BARKER: Not yet.

PROFESSOR GROVE: But I read something from Judge Posner recently. Now, I mean some of this, there must be a way of sorting it out, but he says, first, there is not a shortage of highly qualified applicants; second, departures from the federal courts because of salaries is very rare.[66] He says that even a 50% increase isn't going to make much difference to, say, commercial lawyers who may be earning a million or two million dollars a year.[67]

So in the end, he says that the best argument for a pay raise is that people whose jobs give them a great deal of discretion, but who feel under-appreciated, can sort of take it out on everyone else by underperforming, which is not the kind of argument that's likely to appeal to Congress.

So who's right about this? Are there a lot of judges leaving because of salaries?

JUDGE BARKER: Yes, there was an article—actually, you can get it on the Administrative Office website. There's an article fairly recently identifying the judges who have left in the last two years or something because of salary.

You know, Posner's views are *sui generis*. I don't know of anybody else who views it that way and, when virtually all of the United States Supreme Court thinks otherwise, I just think he sort of marches to his own drummer on this.

PROFESSOR GROVE: It's a contrarian view, that's for sure, but still.

MAGISTRATE JUDGE BAKER: Professor Karlson.

PROFESSOR KARLSON: I'd like to make a comment along those lines, and that is one of the great reforms of the English Parliament in the late nineteenth, early twentieth century was paying members of Parliament. Before that, if you were not independently wealthy, you couldn't sit in parliament because you didn't have any money.

And similarly here, not only are we asking people to serve, but if we do not

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66. Posting of Richard Posner to the Becker-Posner Blog, http://www.becker-posner-blog.com (Mar. 18, 2007, 20:42 EST).

67. *Id.*

pay sufficient money, what we're really saying is if you don't have some independent basis of wealth, don't come to the judiciary. And that has a great impact on the type of people who ultimately become members of the judiciary.

I think it's very important that we recognize that you shouldn't have to have independent wealth to be able to sit as a federal judge and not in some way penalize your family for the choice you have made in serving your country.

MAGISTRATE JUDGE BAKER: That's one of the arguments Justice Roberts has advocated in favor for a pay raise.

Justice Boehm, did you have a comment?

JUSTICE BOEHM: Well, just following up on the point of underperforming, I can't document this, but on an anecdotal basis, I think all of my colleagues will confirm that the amount of time spent by the judiciary in Indiana in 2003 on its own internal affairs, on pay raise grousing, on general dissatisfaction with the state of the judiciary, is way down as a result of the legislation in 2005.

The other point I'd like to make is if you continue on the system we're on, our last pay raise in Indiana was 1995, and we finally got another one ten years later; you do the same thing with the federal system, you end up with these enormous jumps and then everybody says, well, we just gave you a 30% or 50% or a 100% pay raise last year so don't come around and see us for another decade.

In the meantime inflation works its way at everybody. Judges, rich people, poor people calibrate their standard of living to their current income more or less. If you start having 30% declines, which is at a minimum, what happens over a decade if no adjustment is made in nominal dollars is you start squeezing people materially from what their normal expectations are. You know, we've all seen the studies that show many people in parts of relatively impoverished countries are happy because they are living in levels which they regard as satisfactory. The same is true of Americans. If you take a bunch of Americans over time and reduce their standard of living by 30%, you do create a lot of dissatisfaction and psychological pressures and family disorders and all the side effects that we're talking about.

So it's not just a matter of conscious, willful malingering, or malperformance by judges; it has an inevitable collateral damage that's severe. And we've seen it corrected in the state judiciary significantly.

MAGISTRATE JUDGE BAKER: Thank you.

Well, I want to thank the members of the panel, and I hope you'll join me in doing so.

(Applause)

I also want to thank the Indiana State Bar Association again for their assistance and to the Law School for this wonderful facility and being our host today. For the conclusion of our conference today, we have a few closing remarks from the dean, Dean Roberts.

Dean Roberts.

CLOSING REMARKS

DEAN ROBERTS: Well, this has been a fabulous day and I commend the Indiana State Bar for putting together such a terrific program which, of course, made me wonder who lost their mind when they had me giving the closing remarks. But why would you have a sports law guy get up here and talk about such a serious topic as this?

But knowing that there might be an outside chance that somebody actually wanted to hear just a couple of comments, I did jot down a couple thoughts, and I'll just leave you with those.

I do come at this as an antitrust lawyer primarily, which I think gives me an odd perspective, because the antitrust laws, I think, are a whole different animal than constitutional law and a whole different animal than most statutory regimes are. But the way I've always thought of this is that all three of our branches of government are very much political branches. They're populated by human beings who are in various ways subject to the influences of the will of the population, and I think that's as it should be.

However, I think deliberately the judicial branch was designed and operates as the branch that bends much more slowly to the political will of the people. It doesn't respond as quickly to fads and pressures as do the political branches. So, its purpose is to put a governor on mood swings among the people that are perhaps too fast and too extreme. But eventually, if the people lose confidence in the judiciary, then the judiciary is going to have to bend over time to that will.

I remember from law school—it's hard to believe I can remember anything from law school—but I remember reading Alexander Hamilton's Federalist Paper No. 78[68] where he pointed out that judges do not exercise either force or will, but merely judgment. And we have to remember judges command no armies; they have no bureaucracy; they really don't have power to do anything. The only authority or power they have is to the extent the other branches of government and the people of the nation are willing to respect their decisions and agree to follow them. So, ultimately it's important that the other branches of government and the people believe that it's important to have an independent judiciary.

Eventually, the judiciary and the popular will are going to have to converge in some way. You look down through our history; there are always tugs and pulls between the branches of government. In fact, today it's probably more relevant to have a conference on the relations between the executive and the legislative because that seems to be where more tensions exist today than between the legislative and the judiciary.

But I just leave you with a couple of things that I thought about as I was listening today. And that is that I don't think there are many people, no matter how angry they are at a court decision, who would disagree with the notion that the courts have legitimate authority to find legislative or state government conduct unconstitutional. The real issue is where you draw that line.

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68. THE FEDERALIST No. 78 (Alexander Hamilton).

Everybody agrees that at some level of extreme failure to comply with constitutional mandates, the courts need to step in. It's just a question of how quickly they should do that and what sort of legislative enactments or what sort of government conduct reaches the point where we need that kind of judicial intervention, and perhaps a debate or a disagreement over what the appropriate remedy should be when that happens.

With that thought in mind, that we're really not talking about black and white, but rather, like almost everything else in law, we're talking about shades of gray. I note that, with the perspective of history, courts sometimes really make bone-headed decisions. You don't want the courts to be completely independent when those sorts of things happen. If you go back and think *Dred Scott*[69] and *Plessy v. Ferguson*[70] and *Korematsu*[71] are just three cases that come to mind that as we look back on them we say, "Gee, we wish the judiciary hadn't acted the way it had."

On the other hand, I think probably the most important era in judicial evolution from my perspective is to say that sometimes the courts are the only branch of government sufficiently positioned to lead the country in ways that it morally needs to go. And perhaps the most obvious example is the civil rights movement.

I think as we look back, there's not many folks who would think that the Court was wrong to decide *Brown v. Board of Education*[72] the way it did. Perhaps it's the civil rights movement that has given, "judicial activism" a good name because it's the courts that forced this country into a moral imperative that the political branches were just simply not in a position to lead us.

So that's just an example, it seems to me, of the kind of balance you have to make. Sometimes we need the courts to be activists and to make controversial decisions because the country has to move forward; and sometimes the courts move a little further than a lot of people want them to, and the President may propose packing the Court, as FDR did in the '30s, or perhaps Congress will try to impeach a judge or two as happened to Justice Chase back in 1803.

But at the end of the day, I have to confess that I'm not that worried about it because this country has existed for 220 years now with these tugs and pulls and threats and saber rattling and these kinds of tensions all over the place, and yet somehow the pendulum always swings back, and cooler heads always prevail. So, I think that at the end of the day, the system of checks and balances works pretty well. Frankly, you know, whenever I see congressmen propose that we limit the jurisdiction of the courts to decide a specific kind of case, I frankly figure it's never going to happen because before that actually does happen, I think people in Congress will realize that the precedent that sets is really dangerous to the country. Every time it's ever happened, to my knowledge,

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69. Dred Scott v. Sanford, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

70. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

71. Korematsu v. United States, 323 U.S. 214 (1944).

72. 347 U.S. 483 (1954).

cooler heads prevail, courts soften the way they deal with issues a little bit, and Congress moves on. A new President appoints new judges, and things kind of move towards the center, and the crisis passes, and I think that's probably what's likely to happen in the future as well.

But the fact that I'm not that worried ultimately about this—I think it's just a natural part of our political evolution that Congress and the courts have these tensions. That doesn't mean that conferences like this one aren't important, because it is precisely because we think about these things and precisely because we have these kinds of conversations between the branches of government and we force people to think about and reflect on the importance of maintaining an acceptable balance between each of the branches of government that we as a nation will, I think, always come out in the right place in this struggle.

So, as long as we have conferences like this, I think we'll be in great shape. So I want to thank everybody who participated and the judges who came today and Justice Alito and the congressmen who were here this morning and our professors who added a dimension to it—very thought provoking—for participating.

I thank all of you for coming. I'm told we have some food and drink afterwards.

STATE BAR PRESIDENT EYNON: I need to do one last bit of housekeeping. There is a reception, as you just said. We encourage everybody to attend.

We can't put on something like this without sponsors as well. I need to reflect this in the record, Jim. On the back of your program we've already, of course, thanked the Law School several times. Bingham McHale, Bose McKinney & Evans, Connor + Associates, of course, and Littler Mendelson are also our sponsors. We want to thank them, and I wanted that read into the record.

(Applause)

DEAN ROBERTS: I think we have a motion to adjourn.

(At 4:00 p.m., Friday, September 14, 2007, the Conference on Relations Between Congress and the Federal Courts was adjourned.)

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NOTES

FINDING REST IN PEACE AND NOT IN SPEECH: THE GOVERNMENT'S INTEREST IN PRIVACY PROTECTION IN AND AROUND FUNERALS

AMANDA ASBURY*

At the funeral of one of the most publicized victims of a crime against homosexuality, the Westboro Baptist Church gained notoriety.[1] Holding an anti-gay protest outside the funeral of brutally-murdered Matthew Shepard, the church became infamous for professing its view that homosexuality is a sin.[2] Several years later, the church is, again, in the media's spotlight. This time the church is picketing and protesting outside the funerals of American soldiers killed during their military service in the Iraq and Afghanistan wars.[3] "'Thank God for IEDs [Improvised Explosive Devices]'" is just one of the messages that the church's picketers display during their protests in an attempt to convey their larger message that "soldiers' deaths are a sign of God punishing America for tolerating homosexuality."[4] The church's speech has created much controversy, not only for its content, but also because it arguably disrespects the funerals of the deceased and disregards the privacy of those mourning. For these reasons, such protests have induced both state and federal legislatures to pass laws restricting them.[5]

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1. Brian M. Goodman, *Funeral Picketers Sued by Marine's Dad: Lawsuit Claims Anti-Gay Church Furthers Grief for Families of Dead*, CBSNEWS.COM, July 28, 2006, http://www.cbsnews.com/stories/2006/07/27/national/main1843396.shtml.

2. *Id.*

3. Brett Barrouquere, *Judge Suspends Ban on Funeral Protest*, BOSTON.COM, Sept. 26, 2006, http://www.boston.com/news/nation/articles/2006/09/26/judge_suspends_ban_on_funeral_protests/.

4. *Id.*

5. DAVID L. HUDSON, JR., FIRST AMENDMENT CENTER, FUNERAL PROTESTS (2006), http://www.fac.org/assembly/topic.aspx?topic=funeral_protests. "According to the National Conference of State Legislators, [thirty-four] states have introduced bills to limit protests near funerals . . . [and] [twenty-eight] of those states have passed such measures . . . ." *Id.* The twenty-eight states include the following: "Alabama, Colorado, Delaware, Florida, Georgia, Illinois,

Kentucky was one of the many states that enacted such legislation.[6] The constitutionality of its act was recently called into question when a member of the Westboro Baptist Church, Bart McQueary, filed a lawsuit requesting that the court enjoin the state from enforcing certain sections of the Act.[7] The federal district court granted his request for a preliminary injunction, ruling that the part of the Act prohibiting protesting within 300 feet of a funeral was unconstitutional.[8] While the constitutionality of the Act did not turn on the issue of privacy, the nature of the government's interest in protecting the privacy of its citizens while attending a funeral is at the heart of the type of legislation that was challenged in *McQueary v. Stumbo*.[9]

This Note analyzes the role of privacy with respect to funerals and explores its relation to the constitutionality of legislation like that enacted and challenged in Kentucky. Part I briefly examines the background of this issue, describing the church and its demonstrations, the recently enacted state and federal legislation

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Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia and Wisconsin." *Id.*; *see also* ALA. CODE § 13A-11-17 (Lexis Nexis Supp. 2006); COLO. REV. STAT. ANN. § 18-9-106 (West Supp. 2006); DEL. CODE ANN. tit. 11, § 1303 (Supp. 2006); FLA. STAT. ANN. § 871.01 (West 2007); GA. CODE ANN. § 16-11-34.2 (West Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/26-6 (West Supp. 2007); IND. CODE § 35-45-1-3 (Supp. 2006); IOWA CODE ANN. § 723.5 (West Supp. 2007); KAN. STAT. ANN. § 21-4015 (1995); KY. REV. STAT. ANN. § 525.155 (Lexis Nexis Supp. 2007), *partly invalidated by* McQueary v. Stumbo, 453 F. Supp. 2d 975 (E.D. Ky. 2006); LA. REV. STAT. ANN. § 14:103 (Supp. 2007); MD. CODE ANN., CRIM. LAW § 10-205 (West Supp. 2007); MICH. COMP. LAWS ANN. § 750.167d (West Supp. 2007); MINN. STAT. ANN. § 609.501 (West Supp. 2007); MISS. CODE ANN. § 97-35-18 (West Supp. 2006); MO. ANN. STAT. § 578.501 (West Supp. 2007); NEB. REV. STAT. § 28-1320.03 (West Supp. 2006); N.J. STAT. ANN. § 2C:33-8.1 (West Supp. 2007); N.C. GEN. STAT. § 14-288.4 (2006); OHIO REV. CODE ANN. § 3767.30 (Lexis Nexis Supp. 2007), *partly invalidated by* Phelps-Roper v. Taft, No. 1:06CV2038, 2007 WL 915109 (N.D. Ohio Mar. 23, 2007); OKLA. STAT. ANN. tit. 21, § 1380 (West Supp. 2007); 18 PA. CONS. STAT. ANN. § 7517 (West Supp. 2007); S.C. CODE ANN. § 16-17-525 (Supp. 2006); S.D. CODIFIED LAWS § 22-13-17 (2006); TENN. CODE ANN. § 39-17-317 (2006); TEX. PENAL CODE ANN. § 42.055 (Vernon Supp. 2006); VA. CODE ANN. § 18.2-415 (Supp. 2007); WIS. STAT. ANN. § 947.011 (West Supp. 2006).

6. McQueary v. Stumbo, 453 F. Supp. 2d 975, 976-78 (E.D. Ky. 2006).

7. *Id.* at 978-79.

8. *Id.* at 997-98.

9. The *McQueary* court did, however, provide an in-depth analysis of the governmental interest motivating the Act and ultimately "assume[d] that the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid." *Id.* at 992. Following *McQueary*, a federal district court in Ohio addressed a similar statute prohibiting protesting near funerals. Phelps-Roper v. Taft, No. 1:06CV2038, 2007 WL 915109, at *1 (N.D. Ohio March 23, 2007). In finding a 300-foot fixed buffer zone constitutional and a 300-foot floating buffer zone unconstitutional, the court recognized the government's interest in privacy by stating that "the State of Ohio has an interest in protecting mourners, a captive audience, from unwanted speech." *Id.* at *5-7.

that has resulted from these demonstrations, and the recent decision in *McQueary* regarding the constitutionality of such legislation. Part I serves as a factual framework from which to view the following legal analysis. Part II examines the tests for constitutionality of speech regulations that often concern the competing policies of upholding the freedom of speech and serving governmental interests, like the protection of citizens' privacy. Part III explores cases that have addressed the issue of abrogating the freedom of speech in light of the government's interest in protecting the privacy of individuals and compares these cases to the situation presented in *McQueary* and being presented elsewhere in the United States. This Note argues that constitutionally permissible prohibitions in and around the home and around medical clinics are motivated by the same concerns motivating the national and state legislatures to enact funeral protest bans. This Note concludes that the government does have a significant and important interest in protecting the privacy of its citizens who are attending funerals, which justifies the passage of funeral protest ban legislation.

I. BACKGROUND

A. The Westboro Baptist Church

The Kansas-based Westboro Baptist Church ("Church") was founded in 1955 by Fred Phelps[10] and refers to itself as "an Old School (or, Primitive) Baptist Church" that "adhere[s] to the teaching of the Bible, preach[ing] against all form of sin (e.g., fornication, adultery, sodomy), and insist[ing] that [all] doctrines of grace be taught publicly to all men."[11] Among other things, the Church believes that America is being punished by God for its acceptance of sin, and more specifically, for its acceptance of homosexuality.[12] While the Church is relatively small—consisting only of an estimated 100 members—it has been able to make its existence and message known across the fifty states by protesting America's "acceptance" of homosexuality at highly publicized funerals.[13]

The Church first gained nationwide media attention in 1998 when its members held an anti-gay protest outside Matthew Shepard's funeral.[14] The Church used the Wyoming funeral of Shepard, the victim of a hate crime who had been brutally beaten and murdered because he was a homosexual, as a platform to express its belief that homosexuality is a sin.[15] More recently, the Church has appeared and protested at the funerals of the Sago coal miners in West Virginia, at the funerals of the victims of the September 11 terrorist attacks, and, perhaps most notably, at the funerals of the fallen soldiers in the Iraq and

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10. Goodman, *supra* note 1.

11. Westboro Baptist Church Frequently Asked Questions, http://www.godhatesfags.com/main/faq.html (last visited Jan. 14, 2007) [hereinafter Westboro Baptist Church FAQ].

12. Goodman, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

Afghanistan wars.[16] According to the Church, a funeral is "the perfect time to warn" people that "unless they repent, they will likewise perish," because people attending funerals "have thoughts of mortality, heaven, hell, eternity, etc., on their minds."[17]

On March 20, 2006, members of the Church protested at the funeral of Marine Lance Corporal Matthew A. Snyder.[18] Again, the Church members displayed signs expressing their belief that the death of American soldiers is punishment from God for their participation in the defense of a country that tolerates homosexuality.[19] Those attending the funeral of the fallen solider, including his father, Albert Snyder, had to pass the protesting Church members as they entered the church where the private funeral was being held.[20] Despite attempts to ignore the protestors and instead focus on his son's funeral, Albert Snyder was distraught by the presence of the protestors and subsequently brought a lawsuit against the Church for violation of privacy, intentional infliction of emotional distress, and civil conspiracy.[21] Snyder prevailed on all counts, and, on October 31, 2007, the Church and its members were ordered to pay a total of $10.9 million in damages.[22] Following the jury's verdict, "U.S. District Judge Richard Bennett noted the size of the award for compensating damages 'far exceeds the net worth of the defendants,' according to financial statements filed with the court."[23] Nevertheless, the lawsuit appears to have had no or minimal deterrent effect on the Church, given that its members continue to demonstrate at the funerals of fallen servicemen.[24] The Church, however, is also facing pressure from both the federal government and state governments, as legislation aimed at restricting speech at or near funerals is quickly being enacted on both

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16. *Id.*

17. Westboro Baptist Church FAQ, *supra* note 11.

18. Goodman, *supra* note 1.

19. *Id.*

20. *Id.*

21. *Id.* Specifically, Albert Snyder's pleading alleged:

> [T]he defendant church and its members wrongfully intruded upon his son's funeral and subsequently defamed him on the defendants' webpage, causing physical and emotional damages. In addition, defendants' conduct was so intentional and outrageous that the imposition of punitive damages is appropriate to punish the defendants for their actions and to deter the defendants from further reprehensible conduct.

Complaint at 1, Snyder v. Phelps, No. 06CV01389, 2006 WL 2304608 (D. Md. 2007).

22. Punitive Damages at 1, Snyder v. Phelps, No. RBD-06-1389, 2007 WL 3248918 (D. Md. 2007) (awarding $8 million in punitive damages—$6 million for invasion of privacy and $2 million for intentional infliction of emotional distress); Verdict Sheet at 2, Snyder v. Phelps, No. RBD-06-1389, 2007 WL 32489111 (D. Md. 2007) (awarding $2.9 million in compensatory damages).

23. *Church Ordered to Pay $10.9 Million for Funeral Protest*, CNN.COM, Oct. 31, 2007, http://www.cnn.com/2007/US/10/31/funeral.protest/index.html.

24. Westboro Baptist Church Homepage, http://www.godhatesamerica.com/index.html (last visited Nov. 8, 2007).

levels.[25]

B. Federal and State Legislation

In 1992, the Kansas Funeral Picketing Act[26] was signed into law, making Kansas one of the first states to pass an act restricting protests near funerals.[27] The enactment of the law was prompted by the actions of the members of the Church who chose to spread their message by protesting at funerals.[28] The law was challenged by the Church's founder, Reverend Fred Phelps, and was ultimately found to be unconstitutionally vague; a problem that the Kansas legislature quickly corrected.[29]

In an increasing effort to spread their message, the Church began to protest near funerals elsewhere in the country, no longer limiting their efforts to Kansas.[30] By March 2006, the Church's protests had gained nationwide attention and prompted the federal legislature to take action.[31] On March 29, 2006, Michigan Representative Mike Rogers introduced the Respect for America's Fallen Heroes Act.[32] The bill was passed by the House with 408 votes in favor and only three votes in opposition.[33] In the Senate, an amended version of the bill was passed by unanimous consent.[34] On May 29, 2006, President Bush signed the bill into law.[35] The Act was passed "to prohibit certain demonstrations at cemeteries under the control of the National Cemetery Administration and at Arlington National Cemetery, and for other purposes."[36] More specifically, the Act makes a disruptive demonstration on or within 300 feet of a nationally controlled cemetery a misdemeanor if that disruption occurs during the funeral, within one hour preceding the funeral, or within one hour following the funeral.[37] The Act concludes that "[i]t is the sense of Congress that

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25. HUDSON, *supra* note 5.

26. KAN. STAT. ANN. § 21-4015 (1995); *see infra* note 29.

27. HUDSON, *supra* note 5.

28. *Id.*

29. *Id.* The original law was found to be unconstitutionally vague in its reference to "before" and "after" funerals. This problem was fixed by amending the statute to read that the prohibition extended "within one hour prior to, during and two hours following the commencement of a funeral." *Id.*

30. *Id.*

31. *Id.*

32. Library of Congress THOMAS Summary of H.R. 5037, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05037:@@@L&summ2=m& (last visited Jan. 14, 2006) [hereinafter Library of Congress].

33. *Id.*

34. *Id.*

35. *Id.*; HUDSON, *supra* note 5.

36. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (codified as amended in scattered sections of 18 U.S.C. and 38 U.S.C. (2006)).

37. *Id.*

each State should enact legislation to restrict demonstrations near any military funeral," suggesting that states, in addition to the federal government, are to take their own action in curbing the disruptions.[38] The passage of the Act came in the midst of the passage of similar legislation on the state level.[39] Currently, in addition to the federal law, thirty-four states have introduced similar legislation with twenty-eight of those states having already passed such laws.[40]

C. McQueary v. Stumbo

In March 2006, Kentucky Governor Ernie Fletcher added his state to the list of those with laws restricting funeral protests. His state's law was called into question in the United States District Court for the Eastern District of Kentucky, and on September 26, 2006, a decision was handed down in that case.[41] In *McQueary v. Stumbo*,[42] the district court considered the constitutionality of Kentucky's recently enacted House Bill 333 and Senate Bill 93, two acts which made, among other things, demonstrating within 300 feet of a funeral unlawful and a Class B misdemeanor.[43] The court decided to enjoin enforcement of particular sections of the acts, finding that these sections would likely be found to be unconstitutional because "the provisions are not narrowly tailored to serve a significant government interest but are instead unconstitutionally overbroad."[44]

In analyzing the constitutionality of the acts, the court first determined that they were content-neutral and, therefore, subject only to intermediate scrutiny, as opposed to being content-based and subject to strict scrutiny.[45] In reaching this conclusion, the court noted that "[l]ooking to the text of the statute, the provisions at issue apply evenhandedly to all speakers" and, thus, the statute is on its face content-neutral.[46] Furthermore, in considering the totality of the evidence regarding the acts and the motivations behind them, the court held that "the state's predominate purposes in enacting it were content neutral."[47] The

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38. *Id.*; HUDSON, *supra* note 5.

39. SARA CANNON & ELAINE HARGROVE, SILHA CENTER, FREEDOM OF SPEECH: CHURCH GROUP'S PROTESTS SPAWN LEGISLATION LIMITING DEMONSTRATIONS (2006), http://www.silha.umn.edu/Winter%202006%20Bulletin/Funeral%20Protests.pdf. On March 13, 2006, just weeks prior to the introduction of the bill in Congress, over thirty states "had passed or were considering passing laws banning protests near funerals." *Id.*

40. HUDSON, *supra* note 5; *see also* statutes cited *supra* note 5.

41. McQueary v. Stumbo, 453 F. Supp. 2d 975 (E.D. Ky. 2006). The constitutionality of the funeral protest bans of other states are also being called into question. *See* Phelps-Roper v. Taft, No. 1:06CV02038, 2007 WL 915109 (N.D. Ohio Mar. 23, 2007).

42. 453 F. Supp. 2d 975.

43. *Id.* at 976-78.

44. *Id.* at 997.

45. *Id.* at 985-86.

46. *Id.* at 985.

47. *Id.*

acts, therefore, were subject to intermediate scrutiny.[48]

In applying intermediate scrutiny, the statute could only be upheld if it were found to be for the purpose of serving a significant state interest, narrowly tailored to serve that interest, and also left open alternative channels of communication.[49] In examining case law, the court noted that despite the need to protect the free exchange of ideas, a state may regulate speech in order to "protect citizens from unwelcome communications . . . where the communications invade substantial privacy interests in an essentially intolerable manner."[50] Characterizing a funeral as "deeply personal, emotional and solemn," the court assumed for the sake of argument that the state does have an interest in protecting attendees from unwanted communications.[51] Ultimately, however, the court concluded that the statute's means of protecting the attendees "are not narrowly tailored to serve a significant government interest but are instead unconstitutionally overbroad."[52]

II. The Law Governing the Constitutionality of Speech Restrictions

As the *McQueary* court's analysis illustrated, the initial question in determining the constitutionality of a speech restriction concerns whether the regulation at issue is content-based and, therefore, subject to strict scrutiny or content-neutral and subject to intermediate scrutiny.[53] A content-based restriction will pass constitutional muster only if it passes a strict scrutiny test, requiring that the state show a compelling governmental interest for which the law is narrowly tailored.[54] Content-based restrictions are held to this higher standard in order to "ensure that communication has not been prohibited 'merely because public officials disapprove of the speaker's views.'"[55] In the alternative, if the law is found to be content-neutral, it will be subject to a less restrictive standard. A content-neutral restriction will be upheld if the time, manner, and

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48. *Id.* at 986.

49. *Id.* at 981 (quoting Frisby v. Schultz, 487 U.S. 474, 481 (1988)).

50. *Id.* at 989 (stating that "where the communications are directed at citizens in their homes or where the communications are directed at a 'captive' audience and are so obtrusive that individuals cannot avoid exposure to them" the state may regulate the communications).

51. *Id.* at 992.

52. *Id.* at 997. In finding that the statute was not narrowly tailored, the court noted that the acts "burden[ed] substantially more speech than is necessary to prevent interferences with a funeral or to protect funeral attendees from unwanted, obtrusive communications that are otherwise impractical to avoid." *Id.* at 995-96. More specifically, the court took issue with the act's blanket prohibitions on images and sounds, the lack of geographic restrictions regarding their prohibition of distribution of literature, and the fact that the 300-foot buffer zone would prohibit the public's general communications. *Id.* at 996.

53. Madsen v. Women's Health Ctr., 512 U.S. 753, 762-63 (1994).

54. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536-41 (1980).

55. *Id.* at 536 (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

place restrictions are reasonable—they must "'leave open ample alternative channels for communication of the information'" and they must be "'narrowly tailored to serve a significant governmental interest.'"[56] For the purposes of this Note, the following discussion focuses on the nature of the government's interest in privacy protection at funerals, though concerns as to whether funeral protests bans are indeed content-neutral and sufficiently tailored are also important constitutional considerations.

The type of privacy the government seeks to protect through speech regulations has been described as "unique" and "a parasite, deriving its importance not from any direct or consistent source in the Constitution, but as a counterweight which has latched itself onto, in order to restrict, free speech under the First Amendment."[57] Consequently, the origins and nature of this type of privacy interest are muddled and unclear.[58] Speculation leads some to believe that the interest in privacy is somehow derived from the First Amendment itself.[59] Another view proposes that the interest is derived from the Fourth Amendment along with the idea that "a man's home is his castle."[60] Still others attribute the origins to common law tort theories of privacy.[61] Lastly, this type of privacy may be viewed as having its roots in any combination of the aforementioned theories.[62]

Whatever the origin of the privacy interest, the case law has demonstrated that the government may be permitted to protect privacy even if doing so would restrict another's otherwise protected speech.[63] In the past fifty years, a significant amount of case law has established an arguably increasing ability for the state to protect an individual's privacy, particularly in the context of the home and near medical clinics.[64] As will be discussed below, the concerns allowing for

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56. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

57. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1375.

58. *Id.*

59. *Id.* Gormley describes its derivation from the First Amendment by characterizing that amendment as not only the freedom to speak without interference, but also the "freedom of the citizen to think and engage in private thoughts, free from the clutter and bombardment of outside speech." *Id.* at 1381.

60. *Id.* at 1377 (quoting Martin v. City of Strathers, 319 U.S. 141, 150 (1993) (Murphy, J., concurring)).

61. *Id.*

62. *Id.* Appearing to implicate both the First and the Fourth Amendments, for example, Justice Marshall once stated that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565 (1969).

63. Gormley, *supra* note 57, at 1375-76 (stating that "the Supreme Court has in essence institutionalized this species of privacy by routinely balancing it against the right of free speech under the First Amendment—often with the victory going to privacy").

64. *See infra* Parts III.A-C.

privacy protection in these cases also warrant privacy protection near funerals.

III. Case Law

The Supreme Court has yet to determine whether privacy protection should extend to those attending a funeral, particularly if doing so would abridge another's constitutional rights. The Court has, however, addressed cases involving privacy protection in other contexts, such as in and about the home and around medical clinics.[65] Through these analogous cases, insight as to the appropriate test to apply and the relevant factors to consider may be gained.

A. Deriving a Balancing Test from Case Law Involving Restrictions for Mail Entering the Home

In analyzing the government's interest in protecting the privacy of those attending a funeral, the *McQueary* court compared funeral protest bans to several cases involving laws regulating picketers and protestors around the home.[66] Before these cases, however, the Supreme Court addressed a similar issue—the nature of the government's interest in protecting the privacy of its citizens while within the home from unwanted mail. The following sections examine two such cases in an attempt to derive an applicable test to apply when dealing with a statute enacted to serve the government's interest in privacy protection but, as a result, limit and abrogate First Amendment free speech rights.

1. Rowan*: Illustrating the Balance Between the Protection of Privacy and the Right to Speak.*—In 1970, the Supreme Court considered the constitutionality of a federal statute that permitted a person to request that his name be removed from mailing lists to stop future mailings that he deemed to be sexually provocative.[67] The congressional hearings and the legislative history indicated that Congress's intent in enacting the law was to protect the privacy of the home and its residents, particularly minors, from sexually provocative, offensive, and unsolicited material.[68] The Supreme Court, finding the statute constitutional, upheld it.[69]

Faced with a persuasive First Amendment argument that the right to free speech is necessary to a free society, the Court responded that although "communication is imperative to a healthy social order . . . [,] the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[70] In this spirit, the Court rejected the argument that mailers have a constitutionally protected right to express their ideas by sending mail to the homes of unwilling recipients.[71] Addressing the First Amendment argument, the

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65. *See infra* Parts III.A-C.
66. McQueary v. Stumbo, 453 F. Supp. 2d 975, 987-88 (E.D. Ky. 2006); *see infra* Part III.B.
67. Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 729-30 (1970).
68. *Id.* at 731-32.
69. *Id.* at 738.
70. *Id.* at 736.
71. *Id.* at 738.

court stated:

> If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.[72]

Thus, the government can, in some instances, permissibly abridge the First Amendment rights of others in the name of protecting the privacy of its citizens while in their homes.[73] Furthermore, the Court seemed to suggest the government's interest in protecting the captive audience is not limited to the protection of the homes of its citizens, though the Court failed to define where else the government may restrict speech in the name of a captive audience.[74]

The concern expressed in *Rowan*, namely the right of the captive audience to be let alone, was also a concern voiced by policymakers when enacting statutes prohibiting disturbances at or near funerals.[75] As *Rowan* indicated, when considering an intrusion into the home, a place in which one is a captive listener without means of escape, the right to free speech must be balanced against the right to be let alone.[76] The *Rowan* Court expressly stated that these two interests must be balanced when determining the constitutionality of a statute restricting speech entering the home.[77] So too must the rights be balanced when determining the constitutionality of funeral protest bans; the right of those attending a funeral, made captive by their circumstances, to be let alone must be balanced against the right of those protesting to speak their message.

In certain circumstances, such as those presented by the facts in *Rowan*, the government's interest in protecting the privacy of its citizens will outweigh the First Amendment rights of another.[78] In *Rowan*, the residents of the home, bombarded with unwanted speech, became a captive audience whose privacy the government had an interest in protecting.[79] As the Court determined in *Rowan*, this interest was so great that, when balanced against the mailers' right to free speech, the interest in the protection of privacy prevailed, allowing the government to constitutionally restrict the mailers' right to speak.[80]

A similar test could, and arguably should, be employed in determining the

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72. *Id.* (citing Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451 (1952)).

73. *Id.*

74. *See id.*

75. *See* McQueary v. Stumbo, 453 F. Supp. 2d 975, 985 (E.D. Ky. 2006) (In defending Kentucky's House Bill 333 and Senate Bill 93 prohibiting disturbances at funerals, "the Attorney General argue[d] that the state has an interest in protecting its citizens from unwanted communications.").

76. *Rowan*, 397 U.S. at 736.

77. *Id.*

78. *Id.* at 738.

79. *Id.*

80. *Id.* at 737-38.

constitutionality of the funeral protest bans that restrict speech in the name of privacy protection. The Court has acknowledged that it "has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. Such cases demand delicate balancing."[81] If the government's interest in protecting the privacy of its citizens who are attending a funeral and who are essentially a captive audience outweighs the protestor's right to free speech, then the statutes should be upheld, provided that the statute is otherwise constitutional.

2. Tipping the Scales in Favor of the Speaker Per Edison.—Ten years after *Rowan*, in 1980, the Supreme Court considered another case involving the constitutionality of restrictions on mail entering the home.[82] *Consolidated Edison Co. of New York v. Public Service Commission of New York* asked the Court to determine the constitutionality of an order by the Public Service Commission of the State of New York ("Commission") prohibiting utility companies from distributing literature about controversial political topics, such as nuclear power, as inserts in their bills to customers.[83] The order was given after the Natural Resource Defense Council became aware of the politically controversial inserts, like one entitled "Independence is Still a Goal, and Nuclear Power Is Needed to Win the Battle," that Consolidated Edison was placing in its bills to customers.[84] The utility company challenged the constitutionality of the order in the New York state courts, and the New York Court of Appeals upheld the order, finding it to be "a valid time, place, and manner regulation designed to protect the privacy of . . . customers."[85] The United States Supreme Court, however, reversed the judgment, holding that the prohibition was "neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest" and was, therefore, unconstitutional and violative of the right to free speech.[86]

The Court reached its holding based in part on its determination that the restriction on speech was content-based.[87] In an attempt to overcome that finding, the Commission argued that its regulation was "a precisely drawn means of serving a compelling state interest."[88] The Commission argued that the prohibition was necessary to "avoid forcing Consolidated Edison's views on a captive audience."[89] The New York Court of Appeals relied heavily on this argument in support of its decision to uphold the prohibition.[90] The United States

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81. Erznoznik v. Jacksonville, 422 U.S. 205, 208 (1975) (citation omitted).
82. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 532 (1980).
83. *Id.* at 532-33.
84. *Id.* at 532.
85. *Id.* at 533.
86. *Id.* at 544.
87. *Id.* at 538.
88. *Id.* at 540.
89. *Id.*
90. *Id.* at 541.

Supreme Court, however, rejected this claim, recognizing that "[e]ven if a short exposure to Consolidated Edison's view may offend the sensibilities of some consumers, the ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'"[91] As a clarification, the Court stated that "[w]here a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech,"[92] like "[p]assengers on public transportation"[93] or residents of a home disrupted by the loud broadcasts of a passing truck.[94] The recipient of a utility bill, however, is different.[95] As the Court noted, the recipient could avoid the objectionable message by tossing it in the trash can.[96] Thus, the invasion of privacy was not sufficiently intolerable to warrant such restriction, and the restriction was, therefore, an unconstitutional violation of the utility company's First Amendment right to free speech.[97]

In weighing the interest in protecting privacy against the right to free speech, the *Edison* Court indicated that the unwilling audience was responsible, to a certain extent, in protecting his own privacy.[98] While a person in one's home may have no other place of retreat, certain speech can still be avoided by the unwilling residential listener.[99] Offensive speech may enter the home through mail, email, telephone calls, or television programs. Yet, even these forms of speech can be avoided in the home by, for example, throwing the mail in the trash can, setting up email filters, hanging up the phone, or changing the channel. Given that, at least under these circumstances, the unwilling audience can easily avoid the unwanted speech by his own actions, the Court appears hesitant to uphold a statute that abridges another's constitutional right to free speech.

When faced with other circumstances, however, avoidance of speech becomes more problematic. As the Court stated in *Edison*, residents whose homes are bombarded with the loud messages of a passing truck and passengers on public transportation fall into this category.[100] These circumstances present the case of unwilling listeners who are virtually unable to avoid the unwanted speech. They are a captive audience, but as the Court recognizes, they need not be.[101] In such circumstances, the government is permitted to regulate the unwanted speech and protect the captive audience.

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91. *Id.* (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).
92. *Id.* at 541-42.
93. *Id.* at 542 (citing Lehman v. Shaker Heights, 418 U.S. 298, 307-08 (1974)).
94. *Id.* (citing Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949)).
95. *Id.*
96. *Id.*
97. *Id.*
98. *See id.* at 541-42.
99. *Id.*
100. *Id.* at 542.
101. *Id.* at 541-42.

Similarly, government protection should extend to those attending a funeral who, by virtue of their circumstance, are made a captive audience. Just as a passenger on a public bus and the resident of a home bombarded with a loud message are unable to avoid the unwanted speech, so too are the mourners at a funeral. A funeral provides the friends and family of the deceased one last time to pay their respects before the deceased is finally laid to rest. The funeral only occurs once, giving those who wish to participate in the services one opportunity to do so. When confronted with unwanted speech, only two options exist for the funeral attendee: enduring the speech as a captive audience or leaving the funeral and abandoning the chance to say final goodbyes. The latter option is arguably as unrealistic as telling the captive audience on the public bus that he can choose not to ride the bus or telling the person in his home that he has the option to cover his ears to the noisome broadcast of the passing truck. Those attending a funeral cannot simply avoid the speech directed at them by nearby protestors in the same way that homeowners can discard a piece of unwanted mail. Instead, the speech directed at those attending a funeral is an invasion of a substantial privacy interest "'in an essentially intolerable manner.'"[102]

In determining that an interest in privacy is intolerably intruded upon and thus outweighs the interest in free speech, a variety of factors may be considered.[103] Predominate in the Court's consideration of the restrictions presented in both *Rowan* and *Edison* was the ability of the unwilling listener to give notice that he wishes to no longer be an audience to the speech. On this ground, these two cases can be reconciled. In *Rowan*, for example, the Court noted the special circumstances of the case, namely that "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer."[104] In *Rowan*, residents received mailers and then, based upon their judgment that the mail was too provocative, gave notice to the sender that they wished to be removed from the mailing list.[105] No notice was afforded to the utility companies in *Edison*. Instead, the Commission barred their speech.[106]

Notice is a viable option in the context of mailers, given that mailing companies are continuously sending their advertisements and literature to homes, making the residents a continuous audience unless they object. By its very nature, a funeral occurs only once. Thus, notice is not a viable option in the funeral context, making the need for privacy protection at a funeral an even greater interest than is the interest in protecting the privacy of recipients of unwanted mail.

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102. *Id.* at 541 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

103. As will be discussed below, physical characteristics of the place in which the unwilling listener is held captive and the psychological state of the unwilling listener are the primary factors. *See infra* Parts III.B-C.

104. Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970).

105. *Id.* at 729-30.

106. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 532-33 (1980).

B. Cases Involving Restrictions About the Home Illustrating the Physical Characteristics of Places that Hold an Audience Captive and Require Governmental Interest and Protection

The government's interest in privacy protection has also been litigated in terms of regulations that prohibit protesting and picketing outside and about the home, particularly in *Carey v. Brown*,[107] *Frisby v. Schultz*,[108] and *Ward v. Rock Against Racism*.[109] The *McQueary* court used these cases in support of its assumption that the government has an interest in protecting the privacy of those who are attending a funeral.[110] Arguably, by analogy, these cases serve as persuasive authority for upholding funeral protest bans in the name of supporting the governmental interest of privacy protection.

1. Carey *and* Frisby *Illustrating the Physical Characteristics Giving Rise to a Government's Interest in Protecting the Privacy of Captive Citizens.*—In the same year as the Supreme Court decided *Edison*, it also decided *Carey v. Brown*, a case that challenged the constitutionality of an Illinois state statute that made it a misdemeanor "to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business."[111] The statute also contained an explicit exception stating that it did "not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest."[112] The question of the statute's constitutionality arose after several members of the Committee Against Racism were arrested for violating the statute by peacefully protesting the political actions of Chicago's mayor outside his home.[113] Writing for the Court, Justice Brennan affirmed the court of appeals's decision that the Act's "differential treatment of labor and nonlabor picketing could not be justified either by the important state interest in protecting the peace and privacy of the home or by the special character of a residence that is also used as a 'place of employment'" and was, therefore, inconsistent with the principles of the Equal Protection Clause.[114]

Despite striking down the Illinois law as unconstitutional, the Court recognized the interest that Illinois had in protecting the privacy of the home, declaring it "an important value" and "of the highest order in a free and civilized

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107. Carey v. Brown, 447 U.S. 455 (1980); *see infra* notes 111-28 and accompanying text.

108. Frisby v. Schultz, 487 U.S. 474 (1988); *see infra* notes 130-42 and accompanying text.

109. Ward v. Rock Against Racism, 491 U.S. 781 (1989); *see infra* Part III.B.2.

110. McQueary v. Stumbo, 453 F. Supp. 2d 975, 987-89 (E.D. Ky. 2006) (citing *Frisby*, 487 U.S. at 482; *Carey*, 447 U.S. at 471; *Ward*, 491 U.S. at 796).

111. *Carey*, 447 U.S. at 457 (quoting ILL. REV. STAT. ch. 38, § 21.1-2 (1977), *invalidated by* Carey v. Brown, 447 U.S. 455 (1980)).

112. *Id.* (quoting ILL. REV. STAT. ch. 38, § 21.1-2 (1977), *invalidated by* Carey v. Brown, 447 U.S. 455 (1980)).

113. *Id.*

114. *Id.* at 458-59, 471.

society."[115] The Court recognized that

> no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.[116]

Thus, states are constitutionally permitted to restrict speech in the name of the interest of protecting privacy, at least in certain places.[117]

Justice Rehnquist dissented from the majority, finding that the statute should be upheld and that it was in compliance with both the First Amendment and Equal Protection principles based on the reasonableness of its time, place, and manner restrictions.[118] Justice Rehnquist agreed with the majority's conclusion that the government has an interest in protecting residential privacy.[119] In his own explanation, he noted that the state's interest in protecting residential privacy was of such paramount concern that it should prevail over individuals' First Amendment right to picket.[120] In his opinion, the nature of the home justified the protection that the statute provided it by banning residential picketing.[121] Justice Rehnquist explained that "[w]here, as here, the resident has no recourse of escape whatsoever, the State may quite justifiably conclude that the protection afforded by a statute such as this seems even more necessary."[122] In his analysis, Justice Rehnquist emphasized that, in dealing with issues of residential privacy, "it is not just the distraction of the noise which is in issue—it is the very presence of an unwelcome visitor at the home."[123]

Although the Court rarely addresses why it views the home as being the

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115. *Id.* at 471.

116. *Id.* at 470-71 (quoting Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring)).

117. *See id.* (quoting *Gregory*, 394 U.S. at 118 (Black, J., concurring)).

118. *Id.* at 474 (Rehnquist, J., dissenting).

119. *Id.* at 476-77.

120. *Id.* at 477-78. In support of his proposition, Justice Rehnquist cited *Rowan v. U.S. Post Office Department*, recognizing that in that case the Court found that the right of every person to be let alone, especially when in one's home, weighed so heavily against the rights of others to communicate that it prevailed over them. *Id.* at 477 (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970)). Justice Rehnquist also cited *FCC v. Pacifica Foundation*, which upheld the ban of an offensive broadcast because it "'confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.'" *Id.* (quoting FCC v. Pacifica Found., 438 U.S. 726, 748 (1978)).

121. *Id.* at 479.

122. *Id.*

123. *Id.* at 478.

ultimate sanctuary requiring governmental protection, the Court seems to consider that, given the relatively unrestricted nature of speech in traditional areas of public fora, unwilling listeners should have some place from which they might escape the unwanted speech.[124] Just as those speaking have a right to speak, those who are intended to be the listeners have a right to not listen. The protection of the home has a long history in the law as a place from which one can escape the outside world and do, to a certain extent, as he pleases.[125] The home has long been known as a person's "castle," a place over which he has, to some degree, complete dominion.[126] Thus the Court, in addressing the tranquility and the sanctuary that the home provides, recognizes it as a place in which an unwilling listener should be able to retreat in making his decision to not listen.[127] Notably, however, the Court does not limit these places to the home, but indicates that the government should also be able to restrict speech in other places as well.[128]

In 1988, the Supreme Court considered *Frisby v. Schultz*,[129] another case concerning restrictions on residential picketing.[130] This time the Court was confronted with the constitutionality of a city ordinance that completely banned the "picketing 'before or about' any residence."[131] Brookfield, Wisconsin's Town Board enacted the ordinance after a number of the city's residents peacefully picketed outside the home of a doctor, protesting his practice of performing abortions.[132] The purpose of the ordinance was the protection of the home and the preservation of the tranquility and privacy of the residents within their homes.[133] Moreover, the Town Board believed that picketing and protesting about the home emotionally disturbed and distressed its residents, essentially serving as a means of harassment.[134] The district court granted the protestors' request for a preliminary injunction, finding that the ordinance was not narrowly tailored.[135] The court of appeals affirmed this judgment, but the Supreme Court reversed, finding the ordinance to be constitutional because it was content neutral, narrowly-tailored, and left open alternative channels of

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124. *See id.* at 470-71 (quoting Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring)).

125. Daniel J. Solove, *The Origins and Growth of Information Privacy Law*, 828 PLI/Pat 23, 27 (2005) ("The law had long protected one's home. The maxim that the home is one's castle appeared as early as 1499.").

126. *Id.* at 27-28.

127. *Carey*, 447 U.S. at 470-71 (quoting *Gregory*, 394 U.S. at 118 (Black, J., concurring)).

128. *See id.* (quoting *Gregory*, 394 U.S. at 118 (Black, J., concurring)) (indicating that the government may also restrict speech in hospitals, libraries, courts, and schools).

129. 487 U.S. 474 (1988).

130. *Id.* at 476.

131. *Id.*

132. *Id.*

133. *Id.* at 476-77.

134. *Id.* at 477.

135. *Id.* at 478.

communication.[136]

In analyzing the constitutionality of the ordinance, Justice O'Connor, writing for a plurality of the Court, placed great emphasis on the household and the ordinance's explicit prohibition of picketing around the household.[137] Regarding the government's substantial interest in protecting residential privacy, Justice O'Connor noted that the interest was "significant," especially considering that when in one's home, one cannot easily avoid being an unwilling listener.[138] "The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."[139] Justice O'Connor also adopted the language of *Carey*, characterizing the governmental interest in the protection of residential privacy as being "'certainly of the highest order in a free and civilized society'" and "'an important value.'"[140]

Justice O'Connor also noted that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[141] Finding the speech both intrusive and directed at the unwilling resident of the home, the Court found the ordinance to be a constitutional restriction on the picketers' right to free speech, holding that "[b]ecause the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it."[142]

The progression of case law addressing the right to restrict free speech that impedes upon the privacy of individuals within their homes illustrates a growing willingness of the Court to protect citizens from unwanted noise and unwelcome visitors in places from which the audience has no retreat. Central to the idea of the home in this context and critical to the Court's analysis in both *Frisby* and *Carey*, as in both *Rowan* and *Edison*, is the idea that the home is the last place from which the unwilling listener can escape.[143] The home is the place in which the unwilling listener can close his doors, draw his curtains, and isolate himself from the unwanted speech occurring in the outside world. The Court sees the kind of privacy that the home provides as an important interest for the government to protect.[144]

In the past, funerals and wakes took place in the home of the deceased. Had

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136. *Id.* at 488.

137. *Id.* at 484-88.

138. *Id.* at 484.

139. *Id.* at 488 (citing Cohen v. California, 403 U.S. 15, 21-22 (1971)).

140. *Id.* at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

141. *Id.* at 487 (citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y. 447 U.S. 530, 542 (1980)).

142. *Id.* at 488.

143. *See id.* at 484; *Carey*, 447 U.S. at 471; *Edison*, 447 U.S. at 541-42; Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970).

144. *See Frisby*, 487 U.S. at 484; *Carey*, 447 U.S. at 471; *Edison*, 447 U.S. at 541-42; *Rowan*, 397 U.S. at 737.

the issue of funeral protestors presented itself then, the unwilling listeners could shut their windows, close their doors, and pull their curtains. Even in the event that avoidance proved to be too burdensome or impossible, the government could likely restrict the intrusive speech, given the government's interest in privacy protection.[145] Avoidance of speech was, to a certain extent, possible. Today, however, funerals are typically in churches; they proceed in a caravan to a cemetery, where, outside and in the public eye, the deceased is laid to rest. The ability to shut one's door no longer exists. Yet, the need for tranquility and the need to be able to "escape" the unwanted speech remain.

Critical to *Carey* and *Frisby* is the fact that people who are in their homes have no means to avoid the unwanted speech.[146] The home, in both cases, is seen as one's retreat in which one should be able to avoid the "'boisterous and threatening conduct that disturbs the tranquility.'"[147] The same need presents itself at a funeral. Indeed, the government's interest in protecting the privacy of a funeral should be greater because the means of retreat at a funeral is even less realistic than in one's home.

2. Ward*: Illustrating that Speech in Traditional Areas of Public Fora May Be Restricted Through the Government's Interest in Protecting Privacy.*—In 1989, the Court upheld another city's ordinance in the face of constitutional challenges in *Ward v. Rock Against Racism.*[148] In *Ward*, the Court considered the constitutionality of a New York City ordinance that required users of a bandshell located in a public park to use a city-hired, private sound company.[149] The ordinance was partly in response to problems of volume control at events and the resulting disruptions to other, quieter sections of the park and to nearby residents.[150] The ordinance was also enacted to ensure adequate amplification in order to improve and maintain the quality of the performances.[151] Rock Against Racism, an unincorporated association that had used and planned on using the bandshell for a concert, challenged the constitutionality of the ordinance.[152] The district court upheld the ordinance, but the court of appeals reversed, finding that the ordinance did not incorporate the least intrusive means into meeting its goals.[153] The court of appeals, however, was overturned by the Supreme Court, which found that the city need not implement the least restrictive means.[154] Furthermore, the Court upheld the ordinance and declared it constitutional on the

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145. *See Frisby*, 483 U.S. at 484; *Carey*, 447 U.S. at 471; *Edison*, 447 U.S. at 541-42; *Rowan*, 397 U.S. at 737.

146. *See Frisby*, 483 U.S. at 484; *Carey*, 447 U.S. at 471.

147. *Carey*, 447 U.S. at 470-71 (quoting Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring)).

148. 491 U.S. 781, 803 (1989).

149. *Id.* at 787.

150. *Id.* at 784.

151. *Id.* at 786-87.

152. *Id.* at 784-85.

153. *Id.* at 788-89.

154. *Id.* at 789-90.

ground that the "guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication."[155]

In determining that the ordinance was constitutional, the Court recognized that "it can no longer be doubted that government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise.'"[156] Furthermore, the Court noted that protecting the interests of "'well-being, tranquility, and privacy of the home'"[157] from excessive noise is "by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks."[158]

Instituting a ban on protests near funerals may give rise to concerns that such a ban will restrict speech in areas that are typically considered public fora, such as sidewalks and streets. As *Ward* illustrates, however, the government, in protecting the tranquility of its citizens' homes, can even constitutionally restrict speech occurring in public fora, areas generally known to receive strong First Amendment protection.[159] *Ward* also illustrated that regulations designed to protect the privacy of the home are no longer limited to the home, but extend to public streets and parks.[160] Consequently, if courts recognize that the government has a similar interest in protecting the privacy of funerals, states would arguably be allowed to regulate areas around the site of the funeral even if those areas include traditional public fora.

Furthermore, any concerns about the implications of allowing such restrictions in areas typically known for their great and broad protection of the freedom of speech should be quelled by an acknowledgment of the difference, particularly with regards to time limitations, between the kind of restrictions that would be placed about a funeral and those that would be placed about a home. In *Frisby*, for example, the ordinance in question completely banned picketing near a residence.[161] At no time could picketing occur in those specified places.[162] The bans against protesting at funerals, like the ones being enacted across the United States, are, by comparison, much less restrictive as the restrictions have specified space and time limitations.[163]

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155. *Id.* at 803.

156. *Id.* at 796 (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).

157. *Id.* (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988)).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Frisby*, 487 U.S. at 476-77.

162. *Id.*

163. *See, e.g.*, Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (codified as amended in scattered sections of 18 U.S.C. and 38 U.S.C. (2006)) (setting both time and distance limitations upon its restriction of speech).

C. Madsen *and* Hill*: Illustrating the Psychological Characteristics of a Captive Audience Warranting Governmental Interest and Protection*

Thus far, all the cases analogized to the government's interest in protecting the privacy of individuals attending a funeral have concerned the home. Critics may suggest that such a disparity in location precludes any relevancy of these cases to cases like *McQueary*, which involve regulations around funerals. However, the Court, has also acknowledged the government's interest in protecting the privacy of its citizens when they are away from the home, specifically when they are near medical clinics.[164] These cases, too, as the *McQueary* court also recognized, are persuasive authority for acknowledging that the government does have an interest in protecting the privacy of those attending a funeral.[165]

In *Madsen v. Women's Health Center, Inc.*,[166] the Supreme Court sought to resolve the differing opinions of the Florida State Supreme Court and the United States Court of Appeals for the Eleventh Circuit on the constitutionality of an injunction issued by a Florida trial court.[167] The injunction was originally issued in response to people protesting outside a medical clinic where doctors performed abortions.[168] However, the operators of the clinics found the injunction to be insufficient to meet their needs and successfully sought to have the injunction broadened.[169] The revised injunction contained a number of provisions including: (1) a prohibition from "congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [thirty-six] feet of the property line of the clinic," (2) a prohibition "[d]uring the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic," and (3) a prohibition from at any time "approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [clinic's] employees, staff, owners or agents."[170] The protestors, feeling that the revised injunction violated their First Amendment rights, challenged its

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164. *See* Hill v. Colorado, 530 U.S. 703, 718 (2000); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994).

165. McQueary v. Stumbo, 453 F. Supp. 2d 975, 989-92 (E.D. Ky. 2006) (citing *Madsen*, 512 U.S. at 757 and *Hill*, 530 U.S. at 718).

166. 512 U.S. 753.

167. *Id.* at 762.

168. *Id.* at 758.

169. *Id.* at 758-59.

170. *Id.* at 759-60 (quoting Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 679-80 (Fla. 1993)).

constitutionality.[171] The Florida Supreme Court upheld the injunction.[172] The Eleventh Circuit Court of Appeals, however, declared the injunction unconstitutional, finding it to be content-based, not for the advancement of a compelling interest, and not narrowly tailored.[173]

In resolving the conflicting opinions of the courts, the United States Supreme Court determined that the injunction was content-neutral.[174] However, the Court determined that it must apply a heightened standard of review because it was reviewing the constitutionality of an injunction.[175] As a result, the Court applied a test more rigorous than the time, manner, and place review. Instead the Court stated that the key question was "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[176]

In making a determination as to the injunction's constitutionality, the Court considered each provision of the injunction separately.[177] Regarding the thirty-six-foot buffer zone surrounding the clinic, the Court found the provision to be unconstitutional on the basis that it "burden[ed] more speech than necessary to protect access to the clinic."[178]

The Court upheld, however, the provision proscribing excessive noise during certain hours.[179] In doing so, the Court recognized that the state has a significant interest in protecting medical privacy, accepting the analogy to residential privacy that the Florida Supreme Court utilized.[180] Citing to the observations of Florida's highest court, the Supreme Court stated that "while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical[] well-being of the patient held 'captive' by medical circumstance."[181] In considering the noise restrictions around the clinic, the Court stated:

> Hospitals, after all, are not factories or mines or assembly plants. They

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171. *Id.* at 757.

172. *Id.* at 761.

173. *Id.* at 761-62.

174. *Id.* at 763-64.

175. *Id.* at 765. As the Court noted, injunctions are court-issued "remedies imposed for violations (or threatened violations) of a legislative or judicial decree." *Id.* at 764 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953)). In comparing this to an ordinance, which the Court characterized as "a legislative choice regarding the promotion of particular societal interests," the Court recognized the greater possibility of "discriminatory application" in an injunction. *Id.*

176. *Id.* at 765.

177. *Id.* at 768.

178. *Id.* at 771.

179. *Id.* at 772-73.

180. *Id.* at 768.

181. *Id.* (citing Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 673 (Fla. 1993)).

> are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.[182]

Thus, this case illustrates that in certain situations the Court will take into consideration the type of place to which the restriction applies.[183] If, as in the case of hospitals and medical clinics, the place's atmosphere is of paramount importance and certain speech will disrupt that atmosphere, then the Court may find that the government has an interest in restricting that speech in order to protect and preserve that place and its atmosphere.[184] Furthermore, the Court stated that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[185]

The Court differed, however, in its analysis of the "images observable" portion of the same provision and declared it to be unconstitutional.[186] In applying the more rigorous injunction standard, the Court found the portion of the injunction applying to observable images to be too broad and "burden[ing] more speech than necessary to achieve the purpose[s]."[187] In explanation, the Court stated that images, unlike sound, could be more easily avoided, especially when in the confines of a clinic where the "pull [of] its curtains" could eliminate the disruptive speech and its detrimental effects on patients.[188]

Finally, the Court considered and struck down the provision of the injunction that prohibited protestors from demonstrating within 300 feet of the residences of clinic staff.[189] The Court recognized that, per *Frisby*, protecting the privacy of the home is an important governmental interest.[190] In comparing the relatively limited zone in *Frisby* to the 300-foot zone in the injunction, the Court found that the 300-foot zone was significantly larger and "would ban '[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses,'" against which the *Frisby* Court warned.[191] As a consequence, this provision of the injunction was found to be unconstitutional, although the Court advised that, had appropriate and reasonable time and place restrictions been included, such a prohibition might have been upheld.[192]

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182. *Id.* at 772 (quoting NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783-84 n.12 (1979)).
183. *See id.*
184. *See id.*
185. *Id.* at 772-73.
186. *Id.* at 773.
187. *Id.*
188. *Id.*
189. *Id.* at 774-75.
190. *Id.* at 775 (citing Frisby v. Schultz, 487 U.S. 474, 484 (1988)).
191. *Id.* (quoting *Frisby*, 487 U.S. at 483).
192. *Id.*

The *Madsen* Court recognized the emotional vulnerability and the need to preserve the psychological well-being of both patients *and* their loved ones.[193] Those grieving the loss of a loved one, like those *Madsen* seeks to protect, are also likely to be faced with anxiety, worry, and concern. Most often, they are extremely emotionally vulnerable. The existence of "grief counselors" illustrates that the psychological well-being of those who are grieving the loss of a loved one is cause for concern. In addressing this concern and protecting the well-being of those grieving, the government has an interest in seeking to maintain a peaceful and tranquil environment during a funeral. Put another way, the family and friends of the deceased "'need a restful, uncluttered, relaxing, and helpful atmosphere.'"[194] If protestors are acting to disrupt this atmosphere and tranquility, then the government should be allowed to act in order to protect the well-being of its citizens.

More recently, in 2000, the Supreme Court considered a similarly constructed Colorado statute in *Hill v. Colorado*.[195] The challenged section of the statute prohibited a person from "'knowingly approach[ing]' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such person.'"[196] The prohibition existed anywhere within 100 feet of a health care facility and was enacted in response to abortion protestors who had blocked the entrances of clinics and who, on certain occasions, had engaged patients in emotional confrontations.[197] The trial court dismissed the protestors' complaint, holding that "the statute permissibly imposed content-neutral 'time, place, and manner restrictions' that were narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication."[198] The constitutionality of the statute was affirmed by both the Colorado Court of Appeals and the Colorado State Supreme Court.[199] The United States Supreme Court also agreed.[200]

In analyzing the constitutionality of the statute, the Court explicitly acknowledged the competing interests—the right to free speech and the right of the state to protect the welfare of its citizens.[201] Protestors have a constitutionally

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193. *Id.* at 772 (quoting NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783-84 (1979)) (noting that in hospitals the "'patient *and his family* . . . need a restful, uncluttered, relaxing, and helpful atmosphere.'" (emphasis added)).

194. *Id.* (quoting *NLRB*, 441 U.S. 773 at 783-84).

195. 530 U.S. 703, 707 (2000).

196. *Id.* (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).

197. *Id.* at 707-10.

198. *Id.* at 710.

199. *Id.* at 711-12.

200. *Id.* at 714, 735.

201. *Id.* at 715-16. While the majority agreed that the state has an interest in protecting privacy, Justice Scalia dissented claiming that the right to be let alone "is the right of the speaker in the public forum to be free from government interference of the sort Colorado has imposed here." *Id.* at 751 (Scalia, J., dissenting). Even if the majority's characterization of the government's

protected right to free speech on public streets and sidewalks—the "'quintessential' public forums for free speech."[202] The First Amendment's protection, however, does not extend to offensive speech from which the "unwilling audience" is unable to avoid.[203] The Court noted that "[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings" and may depend upon whether the speech occurs in a public park or a private residence.[204] This interest, the Court found, was "an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'"[205] Furthermore, the protection of this interest has "special force in the privacy of the home and its immediate surroundings, but can also be protected in confrontational settings," such as when the speaker relentlessly and doggedly pursues an unwilling audience.[206]

In addition to discussing *Rowan* and *Frisby*, the Court illustrated its position by discussing *American Steel Foundries v. Tri-City Central Trades Council*, which concerned "the right to free passage in going to and from work."[207] Quoting *American Steel*, the Court stated:

> If . . . the offer [to communicate] is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free . . . .[208]

Thus, the Court again emphasized the nature of the unwilling, captive audience and the government's interest in protecting such an audience from the unwanted speech that they are incapable of avoiding.[209]

Having characterized the competing interests, the Court determined that the

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interesting in protecting a citizen's right to be let alone was correct, Justice Scalia argued that such an interest is "not an interest that may be legitimately weighed against the speakers' First Amendment rights." *Id.* In addressing Justice Scalia's dissent, the majority stated that their decision simply acknowledges that previous Supreme Court cases have recognized the interest in protecting an unwilling listener who is unable to avoid the unwanted speech and that these cases have balanced that interest against First Amendment right to free speech. *Id.* at 718 (citing Erznoznik v. Jacksonville, 422 U.S. 205, 208-09 (1975); Lehman v. Shaker Heights, 418 U.S. 298 (1974)).

202. *Id.* at 715.

203. *Id.* at 716 (citing Frisby v. Schultz, 487 U.S. 474, 487 (1988)).

204. *Id.*

205. *Id.* at 716-17 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

206. *Id.* at 717 (citations omitted).

207. *Id.* (citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)).

208. *Id.* (quoting *Am. Steel Foundries*, 257 U.S. at 204).

209. *See id.*

statute was content-neutral.[210] Addressing each type of regulated speech separately—the display of signs, oral speech, and leafletting—the Court then concluded that the statute was narrowly tailored.[211] In addition to considering each type of regulated speech, the Court emphasized that it must also "'take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary.'"[212] State and local governments "plainly have a substantial interest in controlling the activity around certain public and private places."[213] In addition to having an interest in places in or around "schools, courthouses, polling places, and private homes," the Court also noted that the government has "unique concerns that surround health care facilities."[214] In elaborating on the nature of these concerns, the Court, again, quoted *Madsen*, focusing on the fact that hospitals are places where "patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and [her] family . . . need a restful, uncluttered, relaxing, and helpful atmosphere."[215] Writing for the majority, Justice Stevens described that "[p]ersons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions."[216] Thus, considering the place covered by the statute, the statute survived the constitutional challenge and was found by the majority of the Court to be "an exceedingly modest restriction."[217]

With its decisions in both *Madsen* and *Hill*, the Court recognized the need to extend the government's ability to protect the privacy of its citizens beyond the home to other places where citizens are vulnerable, namely, medical clinics and hospitals.[218] Concerns for the emotional and psychological well-being of citizens appear to have motivated the Court.[219] Just as the psychological well-being of the

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210. *Id.* at 719. The Court found the statute to be content-neutral because the statute (1) regulated places and not speech, (2) restricted speech regardless of viewpoint, and (3) the advanced interests of the state that were unrelated to content. *Id.* at 719-20. In making its determination, the Court noted that the statute is not content-based simply because it regulates speech based upon where that speech occurs. *Id.* at 724. Furthermore, the statute is not content-based simply because it was enacted by a group of people who disagreed with the message of those who were challenging the speech. *Id.*

211. *Id.* at 726-30 (finding that the statute was narrowly tailored because ability to read placards was not hindered, that the ability to be heard had not been drastically affected, and that the statute did not go so far as to prohibit leafletters from standing and offering material to those who passed).

212. *Id.* at 728 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994)).

213. *Id.*

214. *Id.* (footnotes omitted).

215. *Id.* at 728-29 (quoting *Madsen*, 512 U.S. at 772).

216. *Id.* at 729.

217. *Id.*

218. *See Madsen*, 512 U.S. at 772.

219. *See Hill*, 530 U.S. at 729 (noting that "[p]ersons who are attempting to enter health care

residents of a home is threatened when the home is bombarded with targeted picketing, the psychological well-being of those receiving medical treatment and their visitors is threatened when protestors gather, verbalize, and display their message outside a hospital.[220] Furthermore, the need for tranquility in a hospital is equally important, if not more important, than the need for tranquility in one's own home. Both patients of a hospital and their visitors, who are all under "emotional strain and worry," need a place where they can find rest and relaxation.[221] Thus, *Madsen* and *Hill* illustrate that the Court's motivation for extending privacy protection embodies a concern for the psychological well-being of people and their need for tranquility in a given situation.[222] These same concerns should also motivate courts to extend privacy protection to funerals.

However, critics argue that the analogy between the regulations restricting protests about medical clinics and regulations restricting protests about funerals is weak and unpersuasive.[223] One distinction to which critics point is that *Madsen* and *Hill* involved "the constitutional right of access to reproductive health services," a fact which is obviously absent from all funeral protest scenarios.[224] Moreover, critics argue that no constitutional right of any kind presents itself in the context of funerals.[225] As one critic and First Amendment scholar noted, "There is simply no constitutional right to have a public funeral free of protests."[226]

Indeed, both *Madsen* and *Hill* involve reproductive rights—the protestors sought to express an anti-abortion message outside hospitals and medical clinics in which advice concerning abortion was being dispensed and abortions were being performed. However, the fact that these cases involved the hotly litigated topics of abortion and women's reproductive rights does not mean the analysis of the Court in reaching its decisions in these cases was completely centered on or solely guided by protecting a constitutional right to reproductive health services. Although the *Madsen* Court did acknowledge the state's interest in protecting a woman's ability to gain access to medical treatment regarding her pregnancy, the Court also considered the legislation in light of the state's interest

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facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions.").

220. *See Madsen*, 512 U.S. at 774-75 (analogizing the government's interest in protecting the well-being in the home to the well-being of patients at a medical clinic).

221. *See Hill*, 530 U.S. at 728-29 (acknowledging the "unique concerns that surround health care facilities").

222. *See id.*; *Madsen*, 512 U.S. at 774-75.

223. *See* Ronald K. L. Collins & David L. Hudson, Jr., *A Funeral for Free Speech?*, FIRST AMENDMENT CENTER, Apr. 17, 2006, http://www.firstamendmentcenter.org/analysis.aspx?id=16775 (stating that the precedent set by the Supreme Court in decisions regarding the restriction of speech around abortion clinics "lends little real support for funeral protest legislation").

224. *Id.*

225. *Id.*

226. *Id.*

in protecting the privacy of its citizens.[227] As previously discussed in *Madsen* and *Hill*, the decisions to allow regulations on speech occurring outside a hospital or medical clinic mostly centered on the need to protect the privacy of the unwilling, captive listener, particularly the one whose physical, mental, and emotional well-being is of concern. Just as in the case of medical clinics, the government is warranted in protecting the privacy of its citizens at funerals where the audience is unwilling, captive, and emotionally distraught.

Legislation around the country demonstrates that the American public agrees that the government has a right to protect the privacy of those attending a funeral. Courts, too, should acknowledge that this particular need for privacy protection is imperative, perhaps even more so in the context of funeral protests than in the context of protests outside a medical clinic. While the emotional vulnerability and concern for the psychological well-being of the mourners and patients mirror one another, the similarities between the two scenarios end upon a consideration of the potential impact the speech may have on its audience. In the context of medical clinics, a patient's medical decisions may be influenced by the words or signs of a nearby protestor, whereas those laying the deceased to rest are not likely to change any of their actions. The woman seeking the abortion might realize, upon viewing the picketers' signs and hearing the protestors' cries, that she should instead "choose life." The woman seeking an abortion may then change her course of action, cancel her appointment, and leave the clinic. However, those laying the dead to rest are not making any life-altering decisions. The picketers' signs and the protestors' cries will not alter the actions of the person who seeks to lay his loved one to rest. Instead, those who are mourning will continue to participate in the ceremony.

D. JB Pictures*: Illustrating the Treatment of Funerals in the Face of First Amendment Challenges*

The Supreme Court has yet to consider a more factually similar case, like *McQueary*, that pits the First Amendment right to free speech against the government's interest in protecting the privacy of its citizens. However, in 1996 the United States Court of Appeals for the District of Columbia decided *JB Pictures, Inc. v. Department of Defense*,[228] a case which placed the First Amendment right of free press against the government's interest in protecting the privacy of the families of fallen soldiers.[229] Although *JB Pictures* more closely resembles *McQueary* than cases like *Rowan*, *Frisby*, *Madsen*, and *Hill* because it deals with both First Amendment rights and privacy interests, *JB Pictures* is also factually distinct. First, *JB Pictures* involves the right to free press, not the right to free speech.[230] Second, *JB Pictures* considers First Amendment rights

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227. *Madsen*, 512 U.S. at 768.
228. 86 F.3d 236 (D.C. Cir. 1996).
229. *Id.* at 238.
230. *Id.*

when they are exercised on military bases, not areas of traditional public fora.[231] Nevertheless, *JB Pictures* serves to supplement previously discussed case law, given that it essentially involves the right of non-mourners to intrude, under the guise of a First Amendment right, upon ceremonies involving the deceased.[232]

Prior to the lawsuit, soldiers killed overseas were returned to the United States through Dover Air Force Base.[233] Their ceremonial returns were open to both the press and the public.[234] However, prior to Operation Desert Storm, the Department of Defense implemented a new policy that allowed for the families of the deceased to have their loved ones reenter the United States at a place more convenient to them.[235] The new change in policy also allowed the bereaved families to deny press coverage of the return of their deceased.[236] In defending its change in policy, the government asserted "an interest in protecting the privacy of families and friends of the dead, who may not want media coverage of the unloading of caskets at Dover."[237]

Ultimately, the court of appeals, finding no constitutional violation, affirmed the judgment of the lower court.[238] After making a determination that the policy was not content-based,[239] the court considered the government's proffered rationales for its policy, including its assertion that the policy attempted to protect the privacy of those mourning the loss of their loved ones.[240] Addressing this interest, the court stated that it did "not think the government hypersensitive in thinking that the bereaved may be upset at public display of the caskets of their loved ones."[241] Without much discussion as to why the court believed as it did, the court seemed to unhesitatingly acknowledge the government's interest.[242]

Likewise, courts should recognize a similar interest in protecting the privacy of the bereaved at a funeral as in *McQueary*. Although funerals are of a smaller scale—they involve a smaller, more intimate setting than the honoring of fallen military soldiers returning from abroad—the concerns are identical. In both instances, the bereaved are attempting to honor and respect their deceased loved ones, an act that the government is attempting to protect through either policies or statutes. Setting aside the special nature of government and military property, the government's interest in protecting the privacy of the grieving family is

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231. *Id.* (noting that unlike areas of traditional public fora, "First Amendment rights to 'freedom of speech, [and] of the press' do not create any per se right of access to government property or activities").

232. *Id.* at 241.

233. *Id.* at 238.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 241.

238. *Id.* at 242.

239. *Id.* at 239-40.

240. *Id.* at 241.

241. *Id.*

242. *Id.*

arguably more important in the context of an actual funeral than it is in the context of the return of fallen soldiers in their caskets. Funerals have been and are private events. However, previous to the policy change challenged in *JB Pictures*, the government allowed for publicity and press coverage of the return of the caskets.[243] Thus, historically, the expectation of privacy is greater in the context of a funeral.

Furthermore, the "public display of the caskets of loved ones" is arguably less intrusive into one's private life than having strangers impeding upon and interfering with an actual funeral. Although the return of a soldier in a flag-draped coffin is undoubtedly a ceremonial event deserving of respect, it lacks the personal nature and solemn finality of an actual funeral. A funeral, with family and friends present, is a deeply personal occasion allowing those present to say their final goodbyes. If the courts can find that the government is not hypersensitive in restricting press at the return of fallen soldiers in their caskets, even while allowing the general public to attend, then courts should also not hesitate to acknowledge the government's interest in restricting people who interfere at funerals.

CONCLUSION

The government has a significant interest in the protection of the privacy of its citizens who are attending funerals. As the *McQueary* court described, "[a] funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications . . . ."[244] The case law acknowledging the government's interest in protecting the privacy of its citizens in and about the home and about medical clinics is analogous to the government's interest in protecting the privacy of its citizens while attending the funeral of a loved one.[245] As previously illustrated, the critical similarities between the situations include the nature of the audience as captive, emotionally vulnerable, and deserving of protection for their psychological well-being.[246]

Furthermore, the case law demonstrates the Supreme Court's increasing willingness to, at least implicitly, support the government in its efforts to protect the privacy of its citizens. In the 1970s, with *Rowan* and *Edison*, the Court acknowledged a governmental interest in protecting the privacy of its citizens while in the home by allowing for the regulation of mail entering the home.[247] In the 1980s, with *Frisby, Carey*, and *Ward*, the Court acknowledged a governmental interest in protecting the privacy of its citizens about the home, allowing for the regulation of protests and concerts occurring outside the

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243. *Id.* at 238.

244. McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006).

245. *See supra* Parts III.A-C.

246. *See supra* Parts III.A-C.

247. *See* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 541 (1980); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970).

home.[248] In the 1990s, with *Madsen* and *Hill*, the Court acknowledged a governmental interest in protecting the privacy of its citizens from speech occurring, not in or about the home, but near medical clinics and hospitals.[249] This progression of case law strongly indicates that, if presented with the issue, courts will likely find, as the *McQueary* court found, that the government, indeed has an interest in protecting the privacy of its citizens while attending a funeral.

Some commentators have criticized such legislation passed in the name of privacy protection as a veiled attempt to restrict speech found offensive based on the content of its message.[250] The Supreme Court has noted that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[251] However, funeral protest bans were not enacted simply because the government found the message expressed by the Church's picketers "offensive and disagreeable." Instead, these restrictions were enacted because the government found the presence of any uninvited and disruptive person unacceptable. Evidence of this is found in the fact that protestors attempting to counter the message of the Church and express their own appreciation and gratitude for the sacrifice of fallen soldiers have been asked by the bereaved families to not attend the funerals.[252]

The Patriot Guard Riders, formed in October 2006, consist of a number of Vietnam War veterans who ride their motorcycles "to form a human shield in front of the protestors so that mourners cannot see them, and when necessary, rev their engines to drown out the shouts of the Westboro Group."[253] Recently, the family of a twenty-year-old Marine killed while on duty in Iraq asked the Patriot Guard Riders to not attend the funeral, desiring peace and tranquility during the ceremony.[254] This family's request illustrates that the motivation for these speech restrictions is not based upon the content of the message delivered, but is based upon the government's interest in protecting the privacy of the bereaved when laying their loved ones to rest.

Even so, some critics strongly resist saying "categorically, that all protests

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248. *See* Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989); Frisby v. Schultz, 487 U.S. 474, 484 (1988); Carey v. Brown, 447 U.S. 455, 470-71 (1980).

249. *See* Hill v. Colorado, 530 U.S. 703, 728-29 (2000); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994).

250. *See* Collins & Hudson, *supra* note 223 (noting that although some say that funeral protest legislation is a content-neutral, reasonable time, manner, place restriction, it actually is not since "[t]he stated or actual purpose of most, if not all, of the measures is to silence objectionable messages").

251. Texas v. Johnson, 491 U.S. 397, 414 (1989) (citing Hustler Magazine v. Falwell, 485 U.S. 46, 55-56 (1988)).

252. Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, April 17, 2006, at A14, *available at* 2006 WLNR 6394879.

253. *Id.*

254. *Id.*

at all funeral events conducted in public are beyond the pale of decency."[255] Elucidating this argument through example, First Amendment scholar Ronald Collins and First Amendment Center Attorney David Hudson consider that when John Wilkes Booth was "finally released for burial, rightfully indignant Americans understandably desired to manifest their moral outrage against the man who murdered President Abraham Lincoln."[256] Although outraged citizens have a right to speak, the time, place, and manner in which they do it may be restricted. Moreover, "like a pig in the parlor instead of the barnyard,"[257] protestors and picketers do not belong at a funeral. Moral outrage as to the crimes of Booth or the policies of this country can and should be expressed elsewhere or at another time.

In addressing whether the government can restrict speech at funerals, courts should weigh the government's interest in protecting the privacy of its bereaved citizens against the protestors' right to free speech.[258] Special consideration should be given to both the captivity of the audience[259] and its emotional and psychological well-being.[260] Just as exceptions have been carved out of the First Amendment's right to free speech in the context of both targeted picketing at a residence[261] and protesting outside a medical clinic,[262] an exception should also be made for those demonstrating at a funeral.

However, adding another exception causes some critics to worry.[263] As Professor Eugene Volokh noted: "The chief danger is the slippery slope: Once the supposedly narrow exception for residential picketing is broadened to cover funeral picketing, these two exceptions . . . could then be used as precedents in arguments for more exceptions (say, for churches or for medical facilities), which would eventually swallow the rule."[264] Thus, the fear is that by continuing to create exceptions to the First Amendment, the right to free speech, which is considered to be the foundation of our nation, is slowly being eroded. These exceptions allowing speech restrictions, however, must still comport with the reasonable time, manner, and place standards.

Furthermore, especially since picketer's have the opportunity to speak their message in other places and at other times, funeral protest bans are not likely to be in strong conflict with the aims of the First Amendment, namely advancing the

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255. Collins & Hudson, *supra* note 223.

256. *Id.*

257. Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

258. *See supra* Part III.A.

259. *See supra* Part III.B.

260. *See supra* Part III.C.

261. *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988).

262. *See* Hill v. Colorado, 530 U.S. 703, 710-14, 735 (2000); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994).

263. Eugene Volokh, *Burying Funeral Protests*, NAT'L REV. ONLINE, Mar. 23, 2006, http://nationalreview.com/comment/volokh200603230730.asp.

264. *Id.*

pursuit of truth and achieving a better, more capable democratic society.[265] The federal statute, in addition to many of the state statutes, prohibits speech that only occurs within a certain distance and time from a funeral.[266] Consequently, the protestors are not completely barred from expressing their message.

Restricting the freedom of speech should not be entered into lightly. However, when the speech of one acts to impede upon the constitutional rights of another, due consideration must be made for both interests. In the context of funerals, when weighing the government's interest in privacy protection against free speech, privacy should prevail. The government should be able to place modest restrictions on the freedom to speak in order to protect the health and well-being of its bereaved citizens—an emotionally distraught, psychologically unstable, and captive audience. Families and friends should be able to lay their loved ones to rest in peace, not in the midst of obnoxious and unwanted speech.

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265. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 534 (1980) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandies, J., concurring); Cohen v. California, 403 U.S. 15, 24 (1971)).

266. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (codified as amended in scattered sections of 18 U.S.C. and 38 U.S.C. (2006)).

GLOBAL WARMING: A QUESTIONABLE USE OF THE POLITICAL QUESTION DOCTRINE

ERIN CASPER BORISSOV*

INTRODUCTION

My seventh grade science teacher told our class that global warming was a myth. Good thing—otherwise we might have had to worry about the future of our environment. Then there was the Chief of Staff for the White House Council on Environmental Quality who censored and edited reports prepared by government scientists to down-play the link between greenhouse gas emissions and global warming.[1] At least the American public was "saved" from having to pay higher prices for energy—prices that would more accurately reflect the cost of consuming that energy.[2] My former science teacher and the White House Administration aide must take solace in the fact that, for the time being, the federal government remains on the sidelines as the scientific community grows closer to a consensus that climate change is occurring and that human activity (i.e., burning fossil fuels) is significantly contributing to that change.[3]

Not everyone is as content as the federal government to remain idle as domestic greenhouse gas emissions continue to escalate. Several states have taken steps to begin to reduce emissions from electric generation plants, automobiles, and other sources of carbon dioxide emissions.[4] Some of the more significant measures include regional cap-and-trade programs by groups of both eastern and western states,[5] administrative agency regulation of emissions,[6] and

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1. Andrew C. Revkin, *Bush Aide Softened Greenhouse Gas Links to Global Warming*, N.Y. TIMES, June 8, 2005, at A1.

2. *See, e.g.*, Felicity Barringer, *California, Taking Big Gamble, Tries to Curb Greenhouse Gases*, N.Y. TIMES, Sept. 15, 2006, at A1.

3. In February 2007, the Intergovernmental Panel on Climate Change ("IPCC") released a summary of its findings from its Fourth Assessment Report due to be released later in 2007. The IPCC reported with ninety percent certainty that the increase in global temperatures over the past fifty years is due to the increase in human-caused greenhouse gas levels. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 10 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf [hereinafter IPCC REPORT].

4. Juliet Eilperin, *Cities, States Take Lead on Global Warming*, BOSTON GLOBE, Aug. 13, 2006, at A5.

5. *See, e.g.*, Timothy Gardner, *Western States United to Bypass Bush on Climate*, REUTERS, Feb. 26, 2007, http://www.reuters.com/article/environmentNews/idUSN2636822120070226; Regional Greenhouse Gas Initiative, About RGGI, http://www.rggi.org/about.htm (last visited Nov. 5, 2007).

6. In 2004, the California Air Resources Board promulgated regulations to limit carbon dioxide emissions from automobiles sold in California beginning in 2009. CAL. CODE REGS. tit.

broad policy initiatives such as the California Global Warming Solutions Act.[7] States have also resorted to traditional common law to try to achieve results outside of their boundaries. In one such case, *Connecticut v. American Electric Power Co.*,[8] eight states, the City of New York, and three private plaintiffs brought an action in federal court alleging that the carbon dioxide emissions of five large electric utility companies caused a public nuisance (i.e. global warming) that must be abated.[9]

American Electric Power is noteworthy because it is the first case in which plaintiffs sought to abate global warming as a public nuisance.[10] The plaintiffs sought an order "enjoining each of the [d]efendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade."[11] However, the plaintiffs must scale a jurisprudential mountain including separation of powers obstacles and justiciability barriers before they can present the merits of their public nuisance claim. Ultimately, the case was dismissed by the district court as a non-justiciable political question.[12]

The purpose of this Note is to examine the major hurdles associated with bringing a public nuisance action for the emission of large quantities of carbon dioxide and the resulting change in global climate and to demonstrate that such a claim is *not* a non-justiciable political question. Part I presents a synopsis of *American Electric Power*. Part II provides background information on public nuisance as a cause of action under federal common law. Part III discusses the issues of preemption and standing which are obstacles the plaintiffs must defeat before the merits of their case will be considered. Part IV introduces the political question doctrine and argues that the plaintiffs' claim in *American Electric Power* does not constitute a non-justiciable political question. Finally, the Note

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13, § 1961.1 (2006). Subsequently, several auto manufacturers filed suit alleging that the regulations were preempted by several federal statutes and on the basis of foreign affairs preemption. Cent. Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160, 1183, *stay granted*, 2007 U.S. Dist. LEXIS 3002 (E.D. Cal 2007). A district court denied California's motion to dismiss the auto manufacturers' complaint and found that they had stated valid claims for preemption by federal statute and foreign affairs preemption. *Id.* at 1188.

7. California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38500 (West Supp. 2008).

8. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

9. *Id.* at 267.

10. *States, NYC File Public Nuisance Lawsuit Against Utilities for Carbon Dioxide Cases*, Legal News—Notable News Developments in the Law, 73 U.S.L.W. 2055 (Aug. 2004). Subsequently, in September 2006, California brought another public nuisance action against six auto manufacturers alleging that the carbon dioxide emissions from their automobiles greatly contribute to global warming. Office of the Attorney Gen., Cal. Dep't of Justice, News and Alerts, *Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California* (Sept. 20, 2006), http://ag.ca.gov/newsalerts/release.php?id=1338.

11. *Am. Elec. Power*, 406 F. Supp. 2d at 270.

12. *Id.* at 271.

concludes that although the district court decision should be overturned on political question grounds, it will not be surprising if the Second Circuit finds that the plaintiffs have failed to overcome at least *one* of the many hurdles they face.

I. *CONNECTICUT V. AMERICAN ELECTRIC POWER CO.*

In July 2004, eight states and the City of New York brought an action under federal common law and, in the alternative, state common law, seeking to abate a public nuisance caused by carbon dioxide emissions of the five electric utilities which represented the largest emitters of carbon dioxide in the country.[13] The plaintiffs included the states of Connecticut, California, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and the City of New York, and the defendants included large electric utility companies, specifically American Electric Power Company, Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corporation.[14]

The plaintiffs alleged that "[t]here is a clear scientific consensus that global warming has begun," that greenhouse gas emissions are a significant cause of global warming, that "carbon dioxide is by far the most significant greenhouse gas emitted by human activity," and that "global warming is expected to accelerate as concentrations of greenhouse gases, and in particular of carbon dioxide, increase."[15] According to the plaintiffs' complaint, defendants emit approximately 650 million tons of carbon dioxide per year, which accounts for about ten percent of all carbon dioxide emissions produced from "human activities in the United States," which substantially contribute to "elevated levels of carbon dioxide and global warming."[16]

The plaintiffs alleged that global warming is a public nuisance under federal common law because increasing temperatures over the next 100 years will have "substantial adverse impacts upon people, environment and property in the plaintiffs' jurisdictions and will require the plaintiffs to expend billions of dollars to respond to the impacts."[17] The plaintiffs claimed that "[d]efendants' carbon dioxide emissions are a direct and proximate contributing cause of global

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13. *Id.* at 267. Three private parties filed a companion suit that was dismissed by the district court in the same decision. *Id.* This Note does not discuss issues specifically related to private plaintiffs.

14. *Id.* Cinergy Corporation merged with Duke Energy in April 2006. Duke Energy, Cinergy Complete Merger, http://www.duke-energy.com/news/releases/2006/Apr/2006040301.asp (last visited Nov. 5, 2007).

15. Complaint at 22-24, *Am. Elec. Power*, 406 F. Supp. 2d 265 (1:04-CV-05669).

16. *Id.* at 1.

17. *Id.* at 29. The plaintiffs cite threatened injuries to public health, coastal resources, water supplies, the Great Lakes, agriculture, ecosystems, forests, fisheries, and wildlife, increased risk of wildfires, increased risk of abrupt and catastrophic climate change, and injury to states' interests in ecological integrity as some of the adverse effects of global warming. *Id.* at 30-42.

warming and of the injuries and threatened injuries to the plaintiffs," which interfere with public rights including "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world."[18] Therefore, the plaintiffs sought to hold defendants jointly and severally liable for creating a public nuisance, cap the defendants' carbon dioxide emissions so as to abate the public nuisance, and reduce the defendants' carbon dioxide emissions going forward "by a specified percentage each year."[19]

The United States District Court for the Southern District of New York dismissed the case for lack of jurisdiction because the case presented a political question, which "the Judiciary is without power to resolve."[20] The district court cited separation of powers, foreign policy, and national security interests implicated by global warming as support for its decision.[21] On June 21, 2007, the Second Circuit ordered the parties to file supplemental letter briefs addressing the impact of the April 2, 2007, Supreme Court decision in *Massachusetts v. EPA*.[22] As of the date this Note went to print, February 4, 2008, the Second Circuit had not yet issued a decision.

II. Public Nuisance and the Federal Common Law

The concept of a public (or common) nuisance began as an invasion against the crown and eventually expanded to encompass an invasion against the right of the public at large.[23] Although many states have enacted statutes which deem certain activities to be "nuisances," nuisance as a common law tort continues to be "judge-made" law.[24] Like any area of common law, the specific elements of a public nuisance action brought under state common law vary by state, but the Restatement is a good starting place. The Restatement (Second) of Torts section 821B(1) defines a public nuisance as "an unreasonable interference with a right common to the general public."[25] Prior to the enactment of federal environmental legislation in the late 1960s and early 1970s, public nuisance played a major role in addressing environmental harms.[26]

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18. *Id.* at 43-44.
19. *Id.* at 49.
20. *Am. Elec. Power*, 406 F. Supp. 2d at 267.
21. *Id.* at 273.
22. 127 S. Ct. 1438 (2007).
23. Restatement (Second) of Torts § 821B cmt. a (1979).
24. *Id.* § 821B cmt. b-c.
25. *Id.* § 821B(1).
26. *See* William H. Rodgers, Jr., Environmental Law § 2.1, at 112-13 (2d ed. 1994) ("Nuisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation . . . ."); *see also* Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What May Work*, 21 Envtl. L. 1549, 1554-55 (1991).

A. Federal Common Law of Public Nuisance

In contrast to state court, where "judge-made" common law is the norm, the *Erie* doctrine has significantly reduced the role of the federal judiciary as a lawmaking entity.[27] However, "the [Supreme] Court has found it necessary, in a 'few and restricted' instances . . . to develop federal common law."[28] Generally this occurs when the conflict presents a federal question (i.e. conflicts between states or interferences with states' rights as quasi-sovereign entities) and when federal statutory law does not directly address the issue.[29]

It is important to note that in the context of a public nuisance action, the application of both state common law and federal common law is inherently inconsistent. A plaintiff cannot bring a public nuisance complaint under *both* state and federal common law because federal common law is only appropriate when there is a federal question involved, and the presence of that federal question necessarily precludes the use of state law.[30] The plaintiffs in *American Electric Power* pleaded in the alternative, bringing their public nuisance action under federal common law and, *in the alternative*, state common law.[31] Their federal common law claim was based on the interstate nature of the carbon dioxide emissions and the alleged injuries to the plaintiffs' quasi-sovereign interests.[32]

B. History of Public Nuisance Cases Involving Pollution Under Federal Common Law

The United States Supreme Court has recognized federal common law claims sounding in public nuisance in a variety of noteworthy environmental or pollution-related cases. In *Missouri v. Illinois* ("*Missouri I*"),[33] the Court found that Missouri stated a claim to enjoin the State of Illinois and the Sanitary District of Chicago from constructing a channel that would have reversed the flow of a river and released large quantities of sewage into the Mississippi River.[34] Missouri claimed that such a release would cause injury to "the health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River."[35]

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27. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 312 (1981).

28. *Id.* at 313 (quoting Wheelden v. Wheeler, 373 U.S. 647, 651 (1963)).

29. *Id.*

30. *Id.* at 313 n.7; *see also* Illinois v. City of Milwaukee, 731 F.2d 403, 410-11 (7th Cir. 1984).

31. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

32. Brief for Plaintiffs-Appellants at 46-48, Connecticut v. Am. Elec. Power Co., No. 05-5104 (2d Cir. Dec. 15, 2005).

33. 180 U.S. 208 (1901).

34. *Id.* at 248.

35. *Id.* at 241. In a later proceeding, the Court reaffirmed its position in *Missouri I* that "a case such as is made by the bill may be a ground for relief." Missouri v. Illinois (*Missouri II*), 200 U.S. 496, 520 (1906). However, after reviewing the evidence presented by Missouri, the Court

In *Georgia v. Tennessee Copper Co.*,[36] Georgia brought action in public nuisance against an out-of-state copper producer seeking to abate the emission of sulfurous acid.[37] The Court held that Georgia had stated a claim because it alleged "wholesale destruction of forests, orchards, and crops" in five counties in the state.[38]

In *New Jersey v. City of New York*,[39] New Jersey sought an injunction to prohibit the City of New York from dumping garbage into the Atlantic Ocean.[40] The Court described New Jersey's alleged injury as "[v]ast amounts of garbage . . . cast on the beaches . . . extend[ing] in piles and windrows along them."[41] The Court found that the garbage was a threat to public health, noxious, ugly, and a negative influence on property values and held that even though the City claimed to be acting pursuant to a permit, the City was still subject to "liability for damage or injury thereby caused to others."[42]

Finally, in *Illinois v. City of Milwaukee* ("*Milwaukee I*"),[43] Illinois brought a public nuisance action to abate the daily release by the City of Milwaukee of about 200 million gallons of "raw or inadequately treated sewage" into Lake Michigan.[44] The Court recognized the cause of action, noting "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law."[45]

Missouri I and *II*, *Tennessee Copper*, *New Jersey*, and *Milwaukee I* and *II* support much of the discussion in the *American Electric Power* appeal on the issue of whether plaintiffs have stated a claim under federal common law and other issues such as preemption and standing discussed *infra*.

C. Federal Common Law—Essential Elements

The elements of a federal common law public nuisance action do not necessarily follow the Restatement definition. To the contrary, they tend to have

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found that it was insufficient to prove the allegations of the bill. *Id.* at 526.

36. 206 U.S. 230 (1907).

37. *Id.* at 236.

38. *Id.*

39. 283 U.S. 473 (1931).

40. *Id.* at 476.

41. *Id.* at 478.

42. *Id.* at 478, 482-83.

43. 406 U.S. 91 (1972).

44. *Id.* at 92-93.

45. *Id.* at 103. In *Milwaukee I*, the Supreme Court declined to exercise original jurisdiction and remanded the case to the district court. *Id.* at 108. On remand, the district court found defendants' dumping of sewage constituted a public nuisance and issued an injunction, which was upheld by the Seventh Circuit. Illinois v. City of Milwaukee, 599 F.2d 151, 169-170 (7th Cir. 1979). However, in *Milwaukee II*, the Supreme Court vacated the Seventh Circuit's decision, finding that the 1972 and 1977 Amendments to the Federal Water Pollution Control Act had preempted the federal common law. City of Milwaukee v. Illinois, 451 U.S. 304, 322-23 (1981).

a "we'll know it when we see it" quality. For example, in *Milwaukee I*, the Court stated, "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution."[46] Rather than defining the elements of a federal common law public nuisance, the Court in *Milwaukee I* gave examples of activities which had been deemed public nuisances in prior decisions.[47] The Court emphasized that "[t]here are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."[48]

In *American Electric Power*, the defendant electric utilities argued that federal common law only contemplates a cause of action in a "simple type" public nuisance.[49] They relied on language from *North Dakota v. Minnesota*[50] and prior Supreme Court decisions to support their contention that only "simple type" nuisances "where immediately noxious or harmful substances invade a State and cause severe localized harms" are actionable under federal common law.[51]

Whereas the defendants contended that a public nuisance claim under federal common law requires a certain type of activity and invasion,[52] the plaintiffs argued that interstate nuisance cases are "intricately linked to our constitutional structure" and that because "States' right to seek redress in federal court for injuries from out-of-state sources to their quasi-sovereign interests was a precondition for ratification of the Constitution," any serious injury to their quasi-sovereign interest is actionable under federal common law.[53] Interestingly, the plaintiffs relied on most of the same cases as the defendants to support their broad interpretation of the scope of a federal common law public nuisance action.[54] This idea stems from early Supreme Court cases, such as *Tennessee Copper*, in which the Court emphasized that an injured State must have recourse in federal court because States gave up their right to forcibly abate a nuisance by joining the United States.[55] The *Tennessee Copper* Court also described the nature of the public nuisance claim in terms of the quasi-sovereign interests at

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46. *Milwaukee I*, 406 U.S. at 107-08.

47. *Id.* at 108.

48. *Id.* at 107-09.

49. Brief for Defendants-Appellees American Electric Power Company, Inc. et al. at 20-23, Connecticut v. Am. Elec. Power Co., No. 05-5104 (2d Cir. Feb. 20, 2006) [hereinafter Brief for Defendants-Appellees].

50. 263 U.S. 365, 374 (1923) ("It is the creation of a public nuisance of simple type for which a state may properly ask an injunction.").

51. New Jersey v. City of New York, 283 U.S. 473 (1931); Brief for Defendants-Appellees, *supra* note 49, at 21 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 200 U.S. 496 (1906)).

52. *Id.* at 20-21.

53. Brief for Plaintiffs-Appellants, *supra* note 32, at 48.

54. *Id.* at 51-53 (citing Illinois v. City of Milwaukee, 599 F.2d 151 (1979); *Tenn. Copper*, 206 U.S. at 237; *Missouri II*, 200 U.S. at 518, 521).

55. *Tenn. Copper*, 206 U.S. at 237.

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> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulfurous acid gas, that the forests on its mountains . . . should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.[56]

Therefore, the plaintiffs argued that "a complaint states a claim where it alleges injuries to quasi-sovereign interests of 'serious magnitude.'"[57]

The widely divergent positions of the plaintiffs and the defendants illustrate that the essential elements of a public nuisance claim under federal common law have not been precisely defined. The lack of a precise definition is due in part to the small number of cases in which a State or any other plaintiff has successfully obtained an injunction to abate a public nuisance under federal common law.[58] In large part, the rarity of these types of public nuisance cases is the result of several major hurdles a plaintiff must clear before the merits of its case will be considered.

III. HURDLES: PUBLIC NUISANCE ACTION FOR ABATEMENT OF POLLUTION

Plaintiffs seeking to bring a common law public nuisance action in a federal court face major hurdles including foreign affairs preemption, preemption of federal common law, preemption of state law, and justiciability issues such as standing and the political question doctrine.

In the late 1960s and early 1970s, Congress began to pass environmental legislation with teeth. Injuries stemming from interstate air and water pollution which were once redressable primarily in the courts were suddenly the subject of broad regulatory schemes at the federal level.[59] As a result, both federalism and separation of powers concerns prompted courts to question the validity of state and federal common law to adjudicate environmental nuisance cases, and

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56. *Id.* at 238.

57. Brief for Plaintiffs-Appellants, *supra* note 32, at 52-53 (citing *Tenn. Copper*, 206 U.S. at 237).

58. *See, e.g.*, Pennsylvania v. Gen. Pub. Utils. Corp., 710 F.2d 117, 120 (3d Cir. 1983); New England Legal Found. v. Costle, 666 F.2d 30, 32 (2d Cir. 1981); Reeger v. Mill Serv., Inc., 593 F. Supp. 360, 363 (W.D. Pa. 1984); United States v. Kin-Buc, Inc., 532 F. Supp. 699, 702 (D.N.J. 1982).

59. *See, e.g.*, Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (2000 & Supp. IV 2004) (establishing a comprehensive regulatory scheme to address water pollution); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2000 & Supp. IV 2004) (establishing a regulatory regime for hazardous waste); Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000 & Supp. IV 2004) (establishing a broad regulation regime to address air pollution); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2000 & Supp. IV 2004) (establishing a regulatory and remediation regime for hazardous substances).

the issue of preemption started taking center stage.[60]

The concept of preemption encompasses three distinct scenarios: (1) foreign affairs policy preempting state or federal common law; (2) federal statutory law preempting federal common law (sometimes called "displacement"); and (3) federal statutory law preempting state statutory or common law.[61] Either of the first or second scenarios could figure prominently in the upcoming decision of the Second Circuit in *American Electric Power*.[62]

A. Foreign Affairs Preemption

The defendants in *American Electric Power* have argued that global warming is an issue of international dimensions, and, as such, all decisions relating to domestic global warming policy should be made by the political branches of the federal government.[63] Although the arguments relating to foreign affairs preemption are similar to the arguments made by the district court in finding the case to be a non-justiciable political question, foreign affairs preemption includes several distinct criteria. First, a claim, whether based on federal common law, state common law, or state statutory law, might be preempted if the claim involves engagement in conduct of foreign policy.[64] Second, a claim might be preempted if the remedy sought by the claim would impair the federal government's bargaining power during negotiations with foreign governments.[65]

The defendants argued that a judicial decision to enjoin their carbon dioxide emissions would "undermine the foreign policy approach to global climate change that Congress established and the Executive Branch is implementing."[66] They pointed to the President's policy of "not mandating unilateral reductions in [carbon dioxide] emissions" and Congress's endorsement of that policy to show that the plaintiffs' claim does interfere with foreign affairs policy.[67] Professor

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60. *See generally* Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 747 (2006).

61. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 294, 311 (2005).

62. Because the plaintiffs in *American Electric Power* pleaded in the alternative, relying first on federal common law public nuisance and, in the alternative, state public nuisance, the third scenario would not come into play until the federal claims were dismissed in a final judgment.

63. Brief for Defendants-Appellees, *supra* note 49, at 44-48.

64. Zschernig v. Miller, 389 U.S. 429, 441 (1968) (involving an Oregon law which based a foreigner's right to inherit property on whether his home country would allow an American citizen to inherit property).

65. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003) (involving a California law related to insurance policies issued to holocaust survivors which interfered with federal government negotiations with foreign governments); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377 (2000) (involving a Massachusetts law that denied certain rights to companies doing business in Burma).

66. Brief for Defendants-Appellees, *supra* note 49, at 44.

67. Norman W. Fichthorn & Allison D. Wood, *Constitutional Principles Prohibit States from*

Merrill points out that a broad reading of *American Insurance Ass'n v. Garamendi* and *Crosby v. National Foreign Trade Council* suggests that states may never interfere in matters which are "under active negotiation between the United States and . . . foreign nations" because such interference will reduce the bargaining power of the United States.[68]

The first response to that argument is that *Garamendi* and *Crosby* cannot be read broadly because just about any state action *could* impair the federal government's negotiating leverage in some way, and therefore a broad reading would be a limitless reading.[69] The second response is that none of the President's international partnerships contemplate mandatory reductions in greenhouse gas emissions.[70] For the most part, international partnerships focus on cooperation to develop better technology, facilitate markets for renewable and other clean sources of energy, and develop policy approaches to help reduce greenhouse gas emissions.[71] Therefore, it is difficult to see how a judicial ruling that would affect the five named defendants would interfere with any ongoing "active negotiations" between the President and the international community on global climate change. Along these lines, the plaintiffs have argued that foreign affairs preemption should *not* apply to the plaintiffs' federal common law public nuisance claim because the abatement of domestic carbon dioxide emissions simply does not involve relations between domestic and foreign actors.[72] The plaintiffs only seek to cap and reduce the *defendants'* emissions.

The defendants must rely on a broad reading of the relevant case law coupled with an assumption that the executive branch is actually engaging in negotiations to cut greenhouse gas emissions with foreign nations to mount a viable foreign affairs preemption argument. Although it is certainly not the defendants' strongest defense, it is one that the plaintiffs will have to defeat.

B. Preemption (or "Displacement") of Federal Common Law

The plaintiffs have brought a case under the federal common law of public nuisance because there is no federal statute that limits carbon dioxide emissions. As the district court noted, "[t]he EPA has ruled that the Clean Air Act does not

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Regulating CO2 Emissions, 26 No. 5 ANDREWS ENVTL. LITIG. REP. 11 (2005).

68. Merrill, *supra* note 61, at 323-24.

69. *Id.* at 327-28.

70. Council on Environmental Quality, Clean Energy and Climate Change, http://www.whitehouse.gov/ceq/clean-energy.html (last visited Nov. 5, 2007).

71. *Id.*

72. *See* Reply Brief for Plaintiffs-Appellants at 27-28, Connecticut v. Am. Elec. Power Co., No. 05-5104 (2d Cir. Sept. 22, 2005); Merrill, *supra* note 61, at 328 (arguing that foreign affairs preemption should not bar plaintiffs' claim in *American Electric Power* because it is grounded in federal common law and it only seeks a remedy within the United States); Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1898-99 (2006) (arguing for a rule which would limit foreign affairs preemption to circumstances in which a state was actually interacting with foreign entities).

authorize carbon dioxide regulation."[73] This begs the essential question: does the lack of federal regulation of carbon dioxide emissions indicate that Congress meant to preempt a federal common law public nuisance action to limit them? The Supreme Court has dealt with the interplay between federal statutory law and pre-existing federal common law in several key cases.

1. Milwaukee II.—In *Milwaukee II*, the Supreme Court held that the 1972 and 1977 Amendments to the Federal Water Pollution Control Act preempted Illinois's federal common law public nuisance action to enjoin the continuing discharge of inadequately treated sewage into Lake Michigan by the City of Milwaukee and several other political subdivisions of the State of Wisconsin.[74] Among other things, the 1972 Amendments prohibited any discharge of pollutants into public waters from any source "except pursuant to a permit."[75] The Environmental Protection Agency ("EPA") and any "qualifying state agency" were authorized to issue permits to sources of discharges, such as the Sewerage Commission of the City of Milwaukee, with "specific effluent limitations" set by EPA rules.[76] The Amendments also provided "for a State affected by decisions of a neighboring State's permit-granting agency to seek redress" by participating in public hearings, submitting written recommendations during the permitting process, or requesting an EPA veto of a pending permit.[77]

In *Milwaukee II*, the Court held that "Congress has not left the formulation of appropriate federal standards to the courts . . . but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."[78] In finding that the Federal Water Pollution Control Act ("FWPCA") had preempted a federal common law action in public nuisance, the Court provided a thorough analysis of federal common law and its relationship to federal statutory law. First, the Court emphasized that federal courts do not generally "develop and apply their own rules of decision" like state courts.[79] Rather, "[f]ederal common law is a 'necessary expedient' . . . and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[80] The Court stated the relevant inquiry as follows: "whether the legislative scheme '[speaks] directly to a question' . . . not whether Congress [has] affirmatively proscribed the use of federal common law."[81] Moreover, the Court indicated that there is a presumption against the use of federal common law because "it is for Congress, not federal courts, to articulate

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73. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 269 (S.D.N.Y. 2005).

74. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 320 (1981).

75. *Id.* at 310-11.

76. *Id.* at 311.

77. *Id.* at 325-26.

78. *Id.* at 317.

79. *Id.* at 312.

80. *Id.* at 314 (quoting Comm. for Consideration of Jones Falls Sewage v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976)).

81. *Id.* at 315.

the appropriate standards to be applied as a matter of federal law."[82]

The Court found the 1972 Amendments to be comprehensive and, thus, a bar to a federal common law nuisance action for several reasons. First, congressional intent was clearly to "establish an all-encompassing program of water pollution regulation."[83] Second, the 1972 Amendments established an administrative regime to thoroughly deal with the "problem of effluent limitations,"[84] and therefore, "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency . . . administering this comprehensive scheme."[85] Finally, the Court noted that the complex nature of the plaintiff's claims made "[t]he invocation of federal common law . . . in the face of congressional legislation supplanting it . . . peculiarly inappropriate."[86]

2. United States v. Texas.—In *United States v. Texas*,[87] the Supreme Court held that the Debt Collection Act of 1982 ("DCA") did not preempt the federal common law right of the United States to collect prejudgment interest on debts owed to it by the states.[88] The "longstanding" federal common law rule required states and private persons to pay prejudgment interest on debts owed to the United States if the debt stemmed from a contractual obligation.[89] The DCA established specific rules regarding prejudgment interest on debts owed to the federal government by private persons, but was silent with respect to debts owed by states.[90] The Court noted that "'[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'"[91] Citing, inter alia, *Milwaukee II*, the Court described the standard by which it would determine whether a federal statute had preempted a federal common law principle. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."[92] Although the statute "need not 'affirmatively proscribe' the common-law doctrine,"[93] "'courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident.'"[94]

Several factors supported the Court's holding that the DCA did not preempt

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82. *Id.* at 305.
83. *Id.* at 318.
84. *Id.* at 320.
85. *Id.*
86. *Id.* at 324-25.
87. 507 U.S. 529 (1993).
88. *Id.* at 530.
89. *Id.* at 533.
90. *Id.* at 534-35.
91. *Id.* at 534 (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).
92. *Id.* (citing City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 315 (1981)).
93. *Id.*
94. *Id.* (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).

federal common law. First, the Court found that the DCA did "not speak directly" to the issue addressed by the common law because it only imposed minimum requirements pertaining to prejudgment interest owed to the federal government by private persons.[95] The Court rejected Texas's argument that because the DCA exempted states from those stringent requirements, the DCA "spoke directly" to the issue addressed by the common law. "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area."[96] Second, the Court found that the DCA was "more onerous than the common law" and that the purpose of the DCA was "to strengthen the Government's hand in collecting its debts."[97] As a result, the preemption of the federal common law would have had the "anomalous effect" of reducing the federal government's ability to collect debts from states under the DCA.[98] In essence, the Court held that gaps in a statutory scheme could be filled by pre-existing federal common law.

3. Preemption of Federal Common Law in American Electric Power.— Given the inconsistencies between *Milwaukee II* and *Texas*, the standard for determining whether congressional action preempts federal common law is far from clear.[99] The plaintiffs in *American Electric Power* argued that under *Milwaukee II* and its progeny, federal common law is only preempted if Congress has regulated carbon dioxide emissions or otherwise provided a remedy for injuries caused by carbon dioxide emissions.[100] Therefore, the plaintiffs argued, because "EPA has determined that the Clean Air Act does not regulate carbon dioxide emissions, and Congress has not enacted any other legislation that provides a remedy for harm caused by carbon dioxide emissions," the federal common law public nuisance claim is not preempted.[101] Recently, the Supreme Court ruled in *Massachusetts v. EPA*[102] that the EPA does have the authority and the duty to regulate carbon dioxide emissions from automobiles under the Clean Air Act unless the EPA finds that such emissions do not endanger public health

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95. *Id.*

96. *Id.* at 535.

97. *Id.* at 536-37.

98. *Id.* at 537-38 ("Congress in the Act tightened the screws . . . on the prejudgment interest obligations of private debtors to the Government, and not on the States. . . . But it does not at all follow that because Congress did not tighten the screws on the States, it therefore intended that the screws be entirely removed. The more logical conclusion is that it left the screws in place, untightened.").

99. Merrill, *supra* note 61, at 311 (arguing that *Milwaukee II* is itself not clear on the standard for preemption of federal common law).

100. Brief for Plaintiffs-Appellants, *supra* note 32, at 58.

101. *Id.* at 60. Professor Merrill calls this the "conflict displacement theory," which asks whether the federal statute regulates the specific substance at issue (carbon dioxide emissions) and whether the federal regulations conflict with the federal common law remedy. Merrill, *supra* note 61, at 311-12.

102. 127 S. Ct. 1438 (2007).

or welfare.[103] Despite the ruling in *Massachusetts*, the plaintiffs' argument that there is no comprehensive regulation remains strong because that case only addressed the EPA's authority and duty to regulate emissions from automobiles and because the EPA must still make its "endangerment finding" and promulgate rules before it regulates those emissions.[104] Moreover, *Texas* supports the idea that pre-existing common law is presumed not to be preempted by Congress's "refusal to legislate" on the issue.[105]

The defendants in *American Electric Power* argued that federal common law is preempted any time Congress legislates "on the subject."[106] Therefore, because several federal statutes discuss (but do not regulate in any way) carbon dioxide emissions,[107] the defendants argued that "Congress has plainly legislated on the subjects of air pollution and carbon dioxide emissions in the context of global climate change."[108] The district court in *American Electric Power* emphasized this point.[109]

Under the defendants' theory of preemption, the key question is whether the Clean Air Act and other legislation related to climate change establish a "comprehensive" regulatory scheme that occupies the field of air pollution. This question remains largely unanswered.[110] A few district courts have ruled that the Clean Air Act preempts nuisance actions based on air pollution under federal common law.[111] However, the Second Circuit specifically declined to decide that

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103. *Id.* at 1462-64.

104. *Id.*

105. United States v. Texas, 507 U.S. 529, 535 (1993).

106. Brief for Defendants-Appellees, *supra* note 49, at 37. Professor Merrill calls this the "field displacement theory" which asks whether there are comprehensive federal regulations relating to air pollution in general and whether those regulations "occup[y] the field." Merrill, *supra* note 61, at 311-12.

107. *See* Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980) (codified in scattered sections of 7 U.S.C., 15 U.S.C., 30 U.S.C., 42 U.S.C., and 50 U.S.C.) (directing a study of the projected impact of carbon dioxide levels in the atmosphere); National Climate Program Act, 15 U.S.C. §§ 2901-2908 (2006) (establishing a national program to help develop understanding and response methods to climate change); Global Change Research Program, 15 U.S.C. §§ 2931-2938 (2000) (establishing a ten-year program to research global climate issues); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified in scattered sections of 16 U.S.C., 25 U.S.C., 26 U.S.C., 30 U.S.C., and 42 U.S.C.) (instructing the Energy Secretary to research and report to Congress on a "least-cost energy strategy" to, inter alia, reduce greenhouse gas emissions).

108. Brief for Defendants-Appellees, *supra* note 49, at 37.

109. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268-69 (S.D.N.Y. 2005).

110. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 35-37 (2003); Merrill, *supra* note 61, at 311-12.

111. *See, e.g.*, Reeger v. Mill Serv., Inc., 593 F. Supp. 360, 363 (W.D. Pa. 1984); United States v. Kin-Buc, Inc., 532 F. Supp. 699, 702 (D.N.J. 1982). Neither *Reeger* nor *Kin-Buc* addressed the question of whether the Clean Air Act preempted nuisance actions based on carbon dioxide emissions.

issue in *New England Legal Foundation v. Costle*,[112] and the Supreme Court has not decided the issue either.[113] The issue has become even more complex given the Supreme Court's recent decision that the EPA *does* have the authority to regulate carbon dioxide emissions from at least one source, automobiles, under the Clean Air Act.[114] The point is that the question of whether federal statutory law preempts public nuisance actions for carbon dioxide emissions under federal common law is most certainly a large hurdle the plaintiffs in *American Electric Power* must overstep before presenting the merits of their case.

C. Standing

Considering the line of cases discussed *supra* in which states have successfully litigated federal common law public nuisance actions, it seems odd that the state plaintiffs in *American Electric Power* would face a serious challenge that they lack standing. However, a quick review of the doctrine of standing indicates that the defendants could craft a strong argument to that effect. The Supreme Court has developed a "two-strand" approach to the doctrine of standing including "Article III standing, which enforces the Constitution's case or controversy requirement . . . and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"[115]

Article III establishes three "constitutional minimum" standing requirements.[116] The first requirement, injury-in-fact, entails "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'"[117] The second requirement, traceability, demands that the injury be "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'"[118] The third requirement, redressability, requires that it "be 'likely,' as opposed to merely 'speculative,' that the injury

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112. 666 F.2d 30, 32 n.2 (2d Cir. 1981) ("[W]e leave for a more appropriate case the question of whether all federal common law nuisance actions involving the emission of chemical pollutants into the air are precluded by the statutory scheme set forth in the Clean Air Act.").

113. Merrill, *supra* note 61, at 311.

114. Massachusetts v. EPA, 127 S. Ct. 1438, 1462 (2007).

115. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992) and Allen v. Wright, 468 U.S. 737, 751 (1984)). Because the minimum Article III standing requirements present a sufficient barrier for plaintiffs to overcome in *American Electric Power*, this Note will not discuss the prudential standing requirements. However, it is important to recognize that "'the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches'" overlaps with other concepts addressed in this Note, such as the political question doctrine and preemption, which could be problematic for the plaintiffs. *Id.* at 11-12 (quoting *Allen*, 468 U.S. at 751).

116. *Lujan*, 504 U.S. at 560.

117. *Id.* (citations omitted).

118. *Id.* at 560-61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (alteration in original)).

will be 'redressed by a favorable decision.'"[119]

1. Parens Patriae *Standing*.—The state plaintiffs in *American Electric Power* argued that they were asserting injuries to a "quasi-sovereign interest" which confers upon them *parens patriae* standing.[120] Essentially, a *parens patriae* action must rest upon "an interest apart from the interests of particular private parties," and "[t]he State must express a quasi-sovereign interest."[121] One example of a quasi-sovereign interest is the "health and well-being—both physical and economic—of [the State's] residents in general."[122] Finally, after considering both direct and indirect affects, the State must allege injury to a "sufficiently substantial segment of its population."[123]

Scholars have generally assumed that the plaintiff states in *American Electric Power* do satisfy the requirements for *parens patriae* standing as set forth in *Snapp*.[124] For one thing, the impact of global warming will affect all citizens of a state in one way or another.[125] Secondly, protecting the health and well-being of a state's citizens from an out-of-state nuisance is a "paradigm case of a quasi-sovereign interest."[126]

Whereas scholars have generally acknowledged that the state plaintiffs in *American Electric Power* satisfy the requirements for *parens patriae* standing, they have not all agreed that this "obviates the need to also establish the traditional elements of private party standing."[127] *Snapp* indicates that the Court was cognizant of the relationship between *parens patriae* standing and Article III standing. The Court explained that quasi-sovereign interest in the well-being of a state's residents is a very broad interest that "risks being too vague to survive the standing requirements of [Article] III."[128] Therefore, a *parens patriae* action must rest upon a quasi-sovereign interest that is "sufficiently concrete to create an actual controversy between the State and the defendant."[129]

One scholar has argued that public officials have automatic standing to bring a public nuisance action because "they are among the paradigmatic public nuisance plaintiffs."[130] This argument is rather circular because it is based on the nature of a public nuisance action. However, it does make logical sense, and it is supported by a good deal of precedent in which the Supreme Court has decided

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119. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

120. Brief for Plaintiffs-Appellants, *supra* note 32, at 39.

121. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

122. *Id.*

123. *Id.*

124. *See* Grossman, *supra* note 110, at 55; Merrill, *supra* note 61, at 304; Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance:* Connecticut v. American Electric Power, 16 FORDHAM ENVTL. L.J. 407, 470 (2005).

125. *See supra* notes 17-18 and accompanying text.

126. Merrill, *supra* note 61, at 304; *see also* Grossman, *supra* note 110, at 55.

127. Pawa & Krass, *supra* note 124, at 469.

128. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982).

129. *Id.*

130. Grossman, *supra* note 110, at 55.

actions brought by States to enjoin public nuisances.[131] Moreover, these cases did not include discussions about Article III standing.[132]

Scholars have also compared *parens patriae* standing in a public nuisance action to criminal prosecution, noting that the government does not have to satisfy Article III requirements in the latter.[133] Standing is not an issue in criminal prosecutions because "criminal prosecutions fall squarely within the 'class of cases and controversies of the sort traditionally amenable to and resolved by the judicial process.'"[134] The flaw in this argument is that the prosecution of a criminal case, unlike *parens patriae* standing, is based upon a state's police power. Indeed, the Supreme Court distinguished police power, *sovereign* power, from the *quasi-sovereign* interest in the well-being of a state's citizens that supports *parens patriae* standing.[135] Whereas *sovereign* power inherently grants the state "the power to create and enforce a legal code, both civil and criminal," *quasi-sovereign* interests must be "sufficiently concrete to create an actual controversy between the State and the defendant" in order to avoid being too broad to "survive the standing requirements of [Article] III."[136] Despite the source of authority, public nuisance actions by States are analogous to criminal prosecutions, and if criminal cases are a "familiar part of the 'judicial power'" that are not subject to traditional standing requirements, there is "little reason why the judicial power should not also extend to public nuisance actions brought by public officials."[137]

The Supreme Court's recent decision in *Massachusetts v. EPA* seems to support the notion that the plaintiff states do have *parens patriae* standing based on quasi-sovereign interests.[138] The Supreme Court ruled that Massachusetts had standing to challenge an EPA action that denied Massachusetts's petition for a rulemaking to regulate carbon dioxide emissions from automobiles.[139] The Court emphasized that when a plaintiff is a sovereign state and not a private party and when the State's interest in the outcome of the litigation is "sufficiently concrete," a State "is entitled to special solicitude in [the Court's] standing analysis."[140] The Court cited *Tennessee Copper* for the proposition that "States are not normal litigants for the purposes of invoking federal jurisdiction."[141] Although the Court referred to *parens patriae* only once in a footnote, its initial discussion of standing seemed to indicate that Massachusetts had standing based

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131. *See supra* notes 32-45 and accompanying text.

132. Merrill, *supra* note 61, at 306.

133. Pawa & Krass, *supra* note 124, at 470.

134. Merrill, *supra* note 61, at 300 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).

135. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601-02 (1982).

136. *Id.*

137. Merrill, *supra* note 61, at 300-01.

138. Massachusetts v. EPA, 127 S. Ct. 1438, 1454 (2007).

139. *Id.* at 1458.

140. *Id.* at 1454-55.

141. *Id.* at 1454.

on its quasi-sovereign interests.[142]

2. Article III Standing.—The Court in *Massachusetts* did not limit the standing analysis to Massachusetts's quasi-sovereign interests. It also discussed the nature of the injury, the fact that EPA's denial of the rulemaking petition contributed to the State's injuries from global warming, and the fact that a judicial remedy *could* slow the pace of global emissions.[143] Unfortunately, the Court did not explicitly state whether it was reviewing the Article III requirements because Massachusetts needed to satisfy them or simply to illustrate that Massachusetts *could* satisfy the more demanding requirements of Article III standing.[144] Therefore, it was unclear whether Massachusetts's quasi-sovereign interests were sufficient to confer standing or whether Massachusetts's satisfaction of the Article III requirements was the determining factor.

Once the discussion moves past *parens patriae* standing, there is far more debate as to whether the plaintiffs (state or private) in *American Electric Power* could satisfy the traditional Article III requirements of injury-in-fact, traceability, and redressability. Although the Supreme Court found that Massachusetts satisfied the Article III standing requirements to sue for injuries caused by global warming, *Massachusetts* can be distinguished from *American Electric Power* in several meaningful ways.[145] Therefore, it is not entirely clear that the standing analysis in *Massachusetts v. EPA* would bind the Second Circuit in *American Electric Power.*

a. Injury-in-fact.—The plaintiffs have alleged numerous injuries that are *likely to occur* as a result of global warming. The problem from a "standing" point of view is that all of the alleged injuries are *future* injuries.[146] Although the scientific community is in general agreement that carbon dioxide emissions are contributing to global warming,[147] there remains uncertainty regarding the specific effects of global warming and when those effects will occur.[148] Thus the defendants can make a strong argument that the injuries alleged by the plaintiffs are not "actual or imminent."

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142. *Id.* at 1454-55.

143. *Id.* at 1455.

144. *Id.*

145. First, Massachusetts sued the EPA under the Clean Air Act, which grants a *procedural right* to challenge an agency action. *Id.* at 1453. Therefore, a litigant "'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.7 (1992)). The plaintiffs in *American Electric Power* rely on common law to challenge the alleged nuisance directly. Second, Massachusetts essentially asserted that because it gave up certain rights to the federal government when it became a state, it had standing to sue the federal government to compel protection of its quasi-sovereign interests. The Court in *Massachusetts v. EPA* seemed to imply that a state had standing to ask the federal government to take action that only *it* could take. *Id.* at 1454. This concept does not necessarily carry over when a state sues a private party to enjoin particular behavior.

146. *See supra* notes 17-18 and accompanying text; *see also* Merrill, *supra* note 61, at 295.

147. IPCC REPORT, *supra* note 3, at 10.

148. *Id.* at 10-16.

Proponents for standing generally give more weight to the available scientific evidence and argue that the effects of global warming are both "actual and imminent."[149] Such actual and imminent effects include "changes in Arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, [and] heat waves."[150] Unlike a case in which a plaintiff alleges a hypothetical harm,[151] a court would certainly need to review and weigh this scientific information before determining that the plaintiffs' alleged injuries were not "actual" or "imminent." Depending on one's opinion of the current scientific evidence, the injuries alleged by the plaintiffs could certainly be considered "actual" or "imminent." The Supreme Court in *Massachusetts v. EPA* found that "rising seas have already begun to swallow Massachusetts' coastal land" which constituted a particularized injury due to lost land and remediation costs and that in general "[t]he harms associated with climate change are serious and well recognized."[152] The Court indicated that Massachusetts's injuries from global warming satisfied the first prong of Article III standing which appears to defeat the defendants' argument in *American Electric Power*.[153]

b. Traceability.—The "traceability" prong requires the plaintiffs to show that the activity of the defendants, not the independent action of a third party, is responsible for the alleged injury.[154] A narrow interpretation of this prong requires the plaintiffs to prove that specific carbon dioxide molecules emitted by the five defendants, rather than total global carbon emissions, which include the defendants' emissions, caused the plaintiffs' injuries. One scholar has argued that "[g]lobal warming plaintiffs will fail to prove causation because the causal chain between their injuries and the emissions of a *particular* defendant is too attenuated by the multiple alternative factors that could be the source of the global warming."[155]

This interpretation is too narrow. Even though Professor Merrill notes that the "defendants are responsible at most for 2.5% of the world's greenhouse gases," he acknowledges that this "market share" problem is not really a standing

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149. Grossman, *supra* note 110, at 40.

150. IPCC REPORT, *supra* note 3, at 8-9. Although the plaintiffs did not allege that these present effects *have* caused injury, they cited many of these facts in their complaint as support for their allegations of *future* injuries. Complaint, *supra* note 15, at 22-23.

151. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiffs' alleged injuries that some of the species that plaintiffs *might* have observed and studied *if* they ever returned to the foreign nation *might* be harmed *due to* the government's failure to enforce the Endangered Species Act were too conjectural).

152. Massachusetts v. EPA, 127 S. Ct. 1438, 1455-56 (2007).

153. *Id.* at 1455-57.

154. *Lujan*, 504 U.S. at 560-61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

155. Blake R. Bertagna, Comment, *"Standing" Up for the Environment: The Ability of Plaintiffs To Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 BYU L. REV. 415, 447 (2006) (emphasis added).

issue.[156] To be sure, Supreme Court jurisprudence with respect to the "traceability" prong does not speak to a situation in which multiple actors have engaged in the same harmful conduct, but only a few have been named as a defendant. Rather, traceability goes to whether the injury alleged is proximately traceable to a person or entity other than the named defendant.[157] Lower court decisions have also recognized this distinction.[158] Therefore, the plaintiffs in *American Electric Power* can make a strong traceability showing because defendants emit a significant amount of carbon dioxide,[159] and carbon dioxide emissions are significantly contributing to the plaintiffs' alleged injuries.[160] Indeed, the Court in *Massachusetts v. EPA* found that the transportation industry, which contributes about six percent of the global carbon dioxide emissions, "make[s] a meaningful contribution" to global warming and that the "EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries."[161]

c. Redressability.—Finally, the plaintiffs must show that if they succeed in obtaining an injunction, their injuries will be redressed. The redressability prong seemingly poses the largest problem for the plaintiffs. Clearly a favorable judicial ruling would only *mitigate* the impacts of global warming because there are multiple domestic and global sources of carbon dioxide emissions including, inter alia, manufacturing, residential and commercial buildings, and highway, rail, and air travel.[162]

The Supreme Court has acknowledged this "multiple source" problem in the context of redressability in several cases.[163] The question is whether eliminating or reducing by judicial ruling *one* source of the plaintiffs' injury will in fact "redress" the injury. Stated another way, does "redress" include reducing the likelihood of the plaintiffs' injury, or must the judicial remedy *actually* reduce the magnitude of the injury? In *Warth, Simon,* and *Lujan*, the Supreme Court adopted the latter definition. In *Massachusetts v. EPA*, the Supreme Court seemed to soften this requirement by holding that an incremental step to mitigate an injury does satisfy the redressability prong.[164]

In *Lujan*, the plaintiffs alleged that United States government-funded projects

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156. Merrill, *supra* note 61, at 297-98.

157. *See, e.g.*, *Simon*, 426 U.S. at 43; Warth v. Seldin, 422 U.S. 490, 505-07 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

158. *See, e.g.*, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000); Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992); Pub. Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 n.8 (3d Cir. 1990).

159. Complaint, *supra* note 15, at 1.

160. *See supra* notes 17-18 and accompanying text.

161. Massachusetts v. EPA, 127 S. Ct. 1438, 1456-58 (2007).

162. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2007, at 101 (2007) *available at* http://www.eia.doe.gov/oiaf/archive/aeo07/pdf/0383(2007).pdf [hereinafter EIA OUTLOOK].

163. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 43-44 (1976); Warth v. Seldin, 422 U.S. 490, 504 (1975).

164. *Massachusetts*, 127 S. Ct. at 1457.

in places like Egypt and Sri Lanka were adversely affecting endangered species and sought a court order to compel the Secretary of the Interior to apply the Endangered Species Act to federal action taken in foreign nations.[165] In holding that the plaintiffs' alleged injuries were not redressable by a favorable judicial ruling, the Court noted, inter alia, that the government "generally suppl[ies] only a fraction of the funding for a foreign project," and there was no reason to believe that the projects would be discontinued if the United States withdrew funding.[166] Therefore, because there were many other sources of funding for a project, a judicial order to eliminate federal funding would not ensure that the endangered species would no longer be adversely affected by a project.[167]

In *Simon*, the plaintiffs alleged that a new Internal Revenue Service ("IRS") policy that allowed a hospital to retain its nonprofit (or charitable) status even if it didn't provide free services to indigent patients caused injury to those patients by discouraging hospitals to provide free service.[168] First, the Court noted that, even if the old IRS policy of requiring a hospital to provide free service "'to the extent of its financial ability for those not able to pay for the services rendered'" was followed, a hospital's decision to provide free services to indigent patients would be based on factors other than the IRS policy including its financial ability and its dependence on its "nonprofit" status.[169] Second, a more favorable IRS policy would not ensure that the *plaintiffs* would have access to free services because the former IRS policy did not require hospitals to provide free services to *all* indigents.[170] Therefore, a court order to implement the old IRS policy would, at best, increase the chance that the indigent plaintiffs would receive free services. This, according to the Court, was not sufficient to satisfy the redressability requirement.[171]

Finally, in *Warth*, low income plaintiffs complained that their town zoning ordinances caused injury by precluding persons of low income from living in the town.[172] The Supreme Court observed that the plaintiffs' injuries were not redressable by a favorable court decision because "their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."[173] The Court also noted that the plaintiffs' ability to live in the town was dependent on "efforts and willingness of third parties to build low- and moderate-cost housing" and that the "record [was] devoid of any indication that . . . , were the court to remove the

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165. *Lujan*, 504 U.S. at 559, 563.

166. *Id.* at 571.

167. *Id.*

168. *Simon*, 426 U.S. at 42.

169. *Id.* at 31-32 (quoting Rev. Rul. 56-185, 1956-1 C.B. 202).

170. *Id.* at 43.

171. *Id.* at 45-46 ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire.").

172. Warth v. Seldin, 422 U.S. 490, 493 (1975).

173. *Id.* at 506.

obstructions attributable to respondents, such relief would benefit petitioners."[174]

In all three cases, the Court rejected the idea that the redressability prong was satisfied by merely increasing the likelihood that the plaintiffs' alleged injuries would be remedied. In *American Electric Power*, obtaining an injunction to reduce and cap the defendants' carbon dioxide emissions will not halt global warming for several reasons. First, the defendants only create about 2.5% of the global carbon dioxide emissions each year.[175] Just like *Lujan*, where cutting off the small percentage of funding supplied by the U.S. government to a foreign project allegedly causing harm to endangered species would not likely halt the injurious project,[176] capping and reducing emissions of the five defendants will not halt global warming.

Second, an immediate curtailment of global carbon dioxide emissions (even a drastic curtailment) would not halt the process of global warming because the greenhouse gases that have already been emitted will remain in the atmosphere and continue to cause surface and sea temperatures to rise.[177] Similar to *Warth*, where a court order to remove zoning restrictions would not necessarily lead to affordable housing for the plaintiffs due to existing market conditions and the plaintiffs' poor financial health,[178] capping and reducing emissions from the five defendants would not necessarily lead to a reduction in the effects of global warming due to existing climate conditions.

Finally, although a reduction in the *defendants*' emissions would reduce the current global level of carbon dioxide emissions, it is safe to assume that global carbon dioxide emissions from other sources will continue to grow.[179] Unless the other domestic and international sources of carbon dioxide are also curbed, any reduction in emissions due to a favorable judicial ruling will be quickly swallowed by increases from other sources.[180] *Simon* and *Warth* both present situations in which the plaintiffs' injuries, lack of access to free hospital services, and lack of access to affordable housing are caused by multiple sources and, therefore, not redressable by eliminating any one source.[181] Assuming, for a moment, that carbon dioxide emissions are the only cause of global warming,

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174. *Id.*

175. Merrill, *supra* note 61, at 297.

176. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992).

177. IPCC REPORT, *supra* note 3, at 17. The report also cited the slow response time of ocean temperatures as another reason why global temperatures would continue to rise. *Id.* at 13.

178. *Warth*, 422 U.S. at 506.

179. The Energy Information Administration ("EIA") projects an average annual growth rate in carbon dioxide emissions from the combustion of fossil fuels of 1.2 percent in the United States alone over the period from 2005 to 2030. EIA OUTLOOK, *supra* note 162, at 101.

180. EIA projects the domestic average annual growth rate over the period from 2005 to 2030 for residential sources to be 1.0%, for commercial sources to be 1.8%, for industrial sources to be 0.7%, for transportation sources to be 1.3%, and for electric power generation to be 1.4%. *Id.* at 164.

181. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42 n.23 (1976); *Warth*, 422 U.S. at 506.

there are still many sources of carbon dioxide emissions, and a favorable judicial ruling in *American Electric Power* would address only five sources. Recognizing that carbon dioxide emissions are not the *only* cause of global warming further supports the argument that the plaintiffs' alleged injuries are not redressable by a favorable ruling.[182]

However, in *Massachusetts v. EPA*, the Court found that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[183] As such, a judicial decision to overturn EPA's refusal to regulate carbon dioxide emissions from vehicles would reduce Massachusetts's injury.[184] If the plaintiffs in *American Electric Power* argue from the perspective of the baseline level of emissions, they can show that a favorable judicial ruling could mitigate their injuries. The Energy Information Administration ("EIA") has projected *total* domestic carbon dioxide emissions for the years 2010 and 2030 using baseline average annual growth rates of 0.93% for the period from 2005 to 2010 and 1.22% for the period from 2005 to 2030.[185] By capping and reducing the defendants' emissions, the *growth rates* of annual emissions and of atmospheric carbon dioxide will be less than the baseline growth rates.[186] Although the total levels of annual emissions and atmospheric carbon dioxide will be higher in five years than they are today, they will be less than they would have been in five years but for capping and reducing the defendants' emissions. Unlike *Simon* and *Warth*, a reduction in the plaintiffs' future injuries (compared to a baseline level) is not dependant upon the activity of any other sources. Contrary to *Lujan*, where cutting government funding of a specific project might not alter the parameters of the project, capping and reducing emissions from the five defendants *will* reduce the future level of emissions as compared to the baseline. Therefore, the plaintiffs can argue that abating the defendants' emissions will satisfy the redressability prong by directly reducing their future injury.

The plaintiffs' strongest argument for standing is that they have *parens patriae* standing and the Supreme Court's recent decision in *Massachusetts v. EPA* seems to support this idea. Even if the Second Circuit agrees, it is not clear whether *parens patriae* standing precludes the need to demonstrate the Article III requirements of injury-in-fact, traceability, and redressability, and *Massachusetts v. EPA* did not definitively answer that question. With respect to injuries caused by global warming, scholars have made valid arguments on both sides of each Article III requirement. However, given the Supreme Court's recent determination that injuries from global warming are concrete, traceable to

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182. Bertagna, *supra* note 155, at 447.

183. Massachusetts v. EPA, 127 S. Ct. 1438, 1458 (2007).

184. *Id.*

185. EIA OUTLOOK, *supra* note 162, at 164. These figures come from a reference case model. EIA also projected emissions based on lower and higher economic growth models. *Id.* at ii.

186. EIA's reference case is "policy-neutral" so it assumes that current laws and regulations will apply throughout the forecast period. *Id.* Therefore, the EIA reference case does not adjust for potential reduction in emissions due to a successful public nuisance action. *Id.*

EPA's failure to regulate, and redressable by a favorable court decision, the defendants in *American Electric Power* will have to distinguish the cause of the plaintiffs' injuries from the cause of the injuries in *Massachusetts v. EPA* in order to convince the Second Circuit that the plaintiffs cannot satisfy Article III standing.

IV. QUESTIONABLE USE OF THE POLITICAL QUESTION DOCTRINE

In the modern legal environment, federalism and separation of powers concerns dictate that a court must intensely scrutinize a common law public nuisance action based on environmental harm to ensure that it is not preempted by federal statutory law[187] and that it is not preempted because it involves conduct of foreign policy.[188] Even under such scrutiny, it is far from certain whether federal statutory law or foreign affairs preempts the plaintiffs' public nuisance claim in *American Electric Power*. It is far from certain whether the plaintiffs lack standing and whether the plaintiffs' public nuisance claim does not satisfy the essential elements of a federal common law public nuisance claim. Still, the defendant electric companies need only convince the court that the claim fails to overcome *one* of these obstacles. Therefore, it is not that surprising that the case was dismissed at the district court level. What *was* surprising was the district court's *sua sponte* refusal to even consider the plaintiffs' claim as a non-justiciable political question given the wide array of theories upon which the case *could* have been dismissed.[189]

The remainder of this Note discusses the political question doctrine as it relates to *American Electric Power*. It shows that the district court framed the plaintiffs' public nuisance claim in such a way as to *create* a political question. It argues that the district court improperly framed the issue in terms of a broad environmental policy question rather than focusing only on the specific public nuisance claim presented by the plaintiffs. Finally, it demonstrates that when the plaintiffs' claim is properly framed, *American Electric Power* does not involve a non-justiciable political question.

A. The Political Question Doctrine

Like the doctrine of standing, the political question doctrine places limits on the types of cases a federal court can decide. The doctrine bars judicial review when "the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[190] In *Vieth v. Jubelirer*, the Court

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187. *See supra* text accompanying notes 100-14.

188. *See supra* text accompanying notes 63-72.

189. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) ("Defendants argue that 'separation-of-powers principles foreclose recognition of the unprecedented "nuisance" action plaintiffs assert,' *which I take to be an argument that Plaintiffs raise a non-justiciable political question*." (citation omitted) (footnote omitted) (emphasis added)).

190. Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

restated the six-factor test set forth in *Baker v. Carr*[191] as the standard by which to determine whether a case presents a non-justiciable political question.[192] Because the six factors are independent, only one of the following factors need be present for the case to be non-justiciable:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[193]

In articulating this test, the *Baker* Court was careful to distinguish between "political cases" and "political questions."[194] The political question doctrine is "primarily a function of the separation of powers" and turns upon "the relationship between the judiciary and the coordinate branches of the Federal Government."[195] In general, a court should not invoke the political question doctrine unless one of the factors is "inextricable" from the case.[196]

The political question doctrine is invoked sparingly and is generally applied to a limited set of circumstances. Since *Baker*, the Supreme Court and the Second Circuit have most commonly invoked or discussed the doctrine in cases involving voting or political gerrymandering,[197] treaty-making authority,[198] war and peace,[199] and certain matters involving foreign policy.[200] In an exhaustive

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191. 369 U.S. 186 (1962).

192. *Vieth*, 541 U.S. at 277-78.

193. *Id.* (quoting *Baker*, 369 U.S. at 217).

194. *Baker*, 369 U.S. at 217.

195. *Id.* at 210.

196. *Id.* at 217.

197. *Compare Vieth*, 541 U.S. at 277-78 (holding by plurality that political gerrymandering cases are not justiciable), *with* Davis v. Bandemer, 478 U.S. 109, 113 (1986) (holding that political gerrymandering cases are justiciable).

198. *Compare* Goldwater v. Carter, 444 U.S. 996, 1002-05 (1979) (refusing to hear a non-justiciable challenge to the President's power to terminate a treaty brought by members of Congress), *with* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (discussing the political question doctrine, but finding that the Court could properly interpret treaties and executive agreements).

199. Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (2d Cir. 1973) (dismissing a congresswoman's claim that the President's hostilities in Cambodia were unconstitutional because the manner in which the legislative and executive branches share warmaking power is a non-justiciable political question).

200. *See, e.g.*, Whiteman v. Dorotheum GmbH & Co., 431 F.3d 57, 69 (2d Cir. 2005)

search for cases in which the political question doctrine has been invoked, very few are even remotely analogous to the common law public nuisance claim in *American Electric Power*.[201] This research is confirmed by the fact that the district court in *American Electric Power* did not cite *any* authority other than *Vieth* and *Baker* to support its finding that the plaintiffs' public nuisance claim presented a political question.[202]

B. The Doctrine in Practice

Although the district court's decision to dismiss *American Electric Power* can be attacked based on the *Baker* factors alone, it is helpful to consider how other courts have applied the doctrine. The following three cases present issues that do not fall squarely into the traditional political question categories of voting or political gerrymandering, treaties, war and peace, and the status of a foreign sovereign and are therefore useful in analyzing the use of the political question doctrine in *American Electric Power*.

1. Gordon v. Texas.—In *Gordon v. Texas*,[203] owners of beachfront property sought injunctive relief and damages for erosion caused by a fish pass owned and used by a combination of private and public defendants and permitted by the Army Corps of Engineers.[204] The Fifth Circuit found the case to be justiciable.[205] Although the court noted that claims for injunctive relief are more "susceptible to justiciability problems," it stated that it is "the potential for a clash between a federal court and other branches of the federal government" that creates a political question.[206]

The Fifth Circuit found that the land owners' request for injunctive relief "would require little federal involvement" despite the fact that the federal government, through the Army Corps of Engineers, issued an original permit for the fish pass, approved other dredging projects, and actively denied requests to remedy the erosion problem.[207] The land owners' request for injunctive relief

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(dismissing claims against Austria for property taken by Nazis as non-justiciable because the United States had entered into an agreement with the Austrian government); Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994) (dismissing as a political question a claim by former citizens of South Vietnam for title as successors in interest to frozen assets of the former South Vietnam because the executive branch has the constitutional authority to recognize property rights of succession with respect to a foreign sovereign).

201. The plaintiffs in *American Electric Power* assert that "[a]ll of the *domestic* controversies in which the Supreme Court or Second Circuit have found a political question have involved a constitutional issue." Brief for Plaintiffs-Appellants, *supra* note 32, at 18 (emphasis omitted) (emphasis added).

202. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271-74 (S.D.N.Y. 2005).

203. 153 F.3d 190 (5th Cir. 1998).

204. *Id.* at 191-92.

205. *Id.* at 196.

206. *Id.* at 194 (emphasis omitted).

207. *Id.* at 195.

sought to require "the State to fill in the [fish pass] and provide some additional beachfront restoration in its immediate vicinity."[208] The court found that, because the land owners' request for injunctive relief did not require any action on the part of the federal government and thus would not "require the district court to abrogate any significant federal policies," a judicial decision to order injunctive relief would not "create a conflict with the federal government."[209] The court also stated that "[t]here is nothing inherent in erosion claims making them difficult to manage judicially; the district court need only determine the existence of liability and, if necessary, the extent of damages."[210] Therefore, the case did not present a political question.[211]

2. Schroder v. Bush.—In *Schroder v. Bush*,[212] small independent farmers sued the President and several other federal officials for declaratory and injunctive relief.[213] The farmers sought an order requiring the President and other defendants to "maintain market conditions favorable to small farmers" by controlling currency, engaging in more favorable trade agreements, imposing a moratorium on farm foreclosures due to disparity in purchasing power, and stepping up enforcement of anti-trust laws with respect to agri-business.[214] The Tenth Circuit applied the *Baker* factors to the farmers' claims, finding that the claims presented "textbook examples of political questions."[215]

First and foremost, the Constitution textually commits regulation of foreign and domestic commerce, enactment of bankruptcy rules, and regulation of currency to the legislative branch.[216] Likewise, the power to make treaties, make foreign policy, and enter into international agreements is constitutionally committed to the executive branch.[217] The farmers' request easily failed the first *Baker* factor.

The court described the farmers' request for injunctive relief as a request that the court "re-formulate national policies" by *requiring the federal government* to alter many federal policies to "maintain market conditions."[218] They rejected the farmers' request because "[c]ourts are ill-equipped to make highly technical, complex, and on-going decisions regarding *how* to maintain market conditions, negotiate trade agreements, and control currency."[219] Such decisions would require the court "to make 'initial policy determinations' in an area devoid of 'judicially discoverable and manageable standards' and where 'multifarious

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208. *Id.*
209. *Id.* at 194-95.
210. *Id.* at 195.
211. *Id.* at 194.
212. 263 F.3d 1169 (10th Cir. 2001).
213. *Id.* at 1171.
214. *Id.* at 1172-73.
215. *Id.* at 1174.
216. *Id.* (citing U.S. CONST. art. I, § 8, cl. 3-5).
217. *Id.* (quoting U.S. CONST. art. II, § 2, cl. 2).
218. *Id.* at 1175-76.
219. *Id.* at 1175 (emphasis added).

pronouncements by various departments' would lead to confusion and disarray."[220] As a result, the farmers' request failed the second, third, and sixth *Baker* factors.[221]

3. Klinghoffer v. S.N.C. Achille Lauro.—In *Klinghoffer v. S.N.C. Achille Lauro*,[222] the plaintiffs brought suit against the Palestine Liberation Organization ("PLO"), claiming that the PLO breached a duty of care owed to the plaintiffs as a result of the PLO's alleged involvement in the hijacking of an Italian cruise liner and the murder of an American passenger.[223] The Second Circuit found that, although the issues before the court arose in a "politically charged context," that did "not convert what [was] essentially an ordinary tort suit into a non-justiciable political question."[224]

The Second Circuit applied the *Baker* factors, noting that the first factor, "whether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department,'" is the most important factor.[225] The court described the case as "an ordinary tort suit" in which the issue was whether "defendants breached a duty of care."[226] The Second Circuit held that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary."[227] The court also emphasized that common law tort principles provide "clear and well-settled rules on which the district court can easily rely."[228] Therefore, the second *Baker* factor was not present. The court went on to find that even though "any decision the . . . court enters will surely exacerbate the controversy surrounding the PLO's activities," [229] none of the *Baker* factors were implicated by an ordinary tort suit.[230]

Gordon and *Klinghoffer* highlight the difference between tort cases, in which the plaintiffs asked the court to apply specific facts to established tort laws such as negligence and nuisance to determine liability, and cases that present non-justiciable political questions like *Schroder*, in which the plaintiffs asked the court to *order the federal government* to implement different policies *at the federal level.* In *Gordon* and *Klinghoffer*, the judiciary could rely on discoverable and manageable tort principles to evaluate the plaintiffs' claims without having to make initial policy decisions.[231] In contrast, a request to change *national* policies in order to change *national* market conditions was not limited to the specific facts of the plaintiffs' case, but rather sought relief at the

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220. *Id.* at 1174 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
221. *Id.* at 1175.
222. 937 F.2d 44 (2d Cir. 1991).
223. *Id.* at 47.
224. *Id.* at 49.
225. *Id.* (quoting *Baker*, 369 U.S. at 217).
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 49-50.
231. Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998); *Klinghoffer*, 937 F.2d at 49.

national level.[232] As such, it was constitutionally committed to the legislative branch and required "initial policy determination[s] of a kind clearly for nonjudicial discretion."[233]

C. Analysis: Framing Matters

Like most legal matters, the way in which an issue is framed is highly relevant to whether the issue is justiciable. In *American Electric Power*, the district court accepted the defendants' "framing" of the issue as "'an environmental policy question with sweeping implications for the nation's economy, its foreign relations, and even potentially its national security.'"[234] The court characterized the plaintiffs' claim as "transcendently legislative" and stated that it touched upon "many areas of national and international policy."[235] Rather than stating the issue in terms of whether defendants' carbon dioxide emissions amount to a public nuisance, the district court queried whether the interest in imposing "strict schemes to reduce pollution rapidly"[236] outweighed the economic implications to industrial development of such a "strict" scheme.[237] As to the latter question, the district court concluded that it was "impossible" to balance those interests "without an 'initial policy determination' first having been made by the elected branches."[238]

By framing the issue so broadly, the district court was able to expand the reach of any potential judicial decision well beyond the specific parties and allegations of the complaint. Under the district court's interpretation of the issue, the entire nation (even the world) would be significantly affected by any potential decision.[239] The court insisted the plaintiffs were asking it to "determine and balance the implications of [an injunction] on the United States' ongoing negotiations with other nations concerning global climate change."[240] The district court also maintained that the public nuisance claim would require it to "assess and measure available alternative energy resources" and to "determine and balance the implications of such relief on the United States' energy sufficiency and *thus its national security*."[241]

Although *American Electric Power* is novel in the sense that it is the first case in which plaintiffs sought to abate global warming as a public nuisance, it

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232. *See* Schroder v. Bush, 263 F.3d 1169, 1174 (10th Cir. 2001).

233. Baker v. Carr, 369 U.S. 186, 217 (1962).

234. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) (quoting Transcript of Oral Argument at 6:1-6:5).

235. *Id.* at 272.

236. *Id.* (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 847 (1984)).

237. *Id.*

238. *Id.*

239. *Id.* at 273.

240. *Id.* at 272.

241. *Id.* (emphasis added).

is still a regular public nuisance case. The plaintiffs asserted that "[d]efendants' carbon dioxide emissions are a direct and proximate contributing cause of global warming and of the injuries and threatened injuries to the plaintiffs"[242] which interfere with public rights including "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world."[243] Therefore, plaintiffs sought to hold defendants liable for creating a public nuisance and to cap and reduce *defendants'* carbon dioxide emissions.[244] Under the Restatement definition, plaintiffs simply asked the district court to decide whether defendants' carbon dioxide emissions are unreasonable and whether they interfere with a public right.[245] This is the type of task that courts are asked to do on a regular basis.[246] As the Second Circuit in *Klinghoffer* noted, "[t]he fact that the issues before [the court] arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question."[247] The proper way to frame the issue before the court is whether defendants' carbon dioxide emissions amount to an unreasonable interference with a public right. The answer to this question may very well be "no," but a potentially weak case on the merits does not morph into a non-justiciable political question.

It is easy to see that the district court's "framing" of the issue in *American Electric Power* facilitated its conclusion that the judicial branch should not hear the case. One can fairly argue that the question of whether the interest in imposing a "strict scheme to reduce pollution rapidly" outweighs the economic implications to industrial development of such a "strict" scheme would violate several *Baker* factors. Indeed, the issue framed this way seems to contemplate a *comprehensive* scheme to reduce *all* pollution by *all* polluters which must be balanced against the economic costs to *all* industry.

First, a "judicial fiat" purporting to bind more than the specific parties to the case *would* be "transcendently legislative."[248] This would be analogous to *Schroder* in which the farmers asked the court for an injunction to "maintain market conditions favorable to small farmers" by controlling currency, engaging in more favorable trade agreements, imposing a moratorium on farm foreclosures, and stepping up enforcement of anti-trust laws with respect to agri-business.[249] As the Tenth Circuit noted in *Schroder*, such regulatory action was constitutionally committed to the legislative and executive branches, and the

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242. Complaint, *supra* note 15, at 44.

243. *Id.* at 43.

244. *Id.* at 49.

245. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

246. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985) ("We have no doubt that the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and this is a public nuisance . . . .").

247. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991).

248. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

249. Schroder v. Bush, 263 F.3d 1169, 1171-73 (10th Cir. 2001).

farmers' request easily failed the first *Baker* factor.[250] Likewise, a comprehensive scheme to reduce pollution might require a determination and balancing of "the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change," if the President was actually engaging in said negotiations.[251] This would contemplate foreign relations policy, which is constitutionally committed to the executive branch.[252]

However, when the plaintiffs' claim is framed properly, a judicial determination of whether defendants' carbon dioxide emissions amount to an unreasonable interference with a public right does not impinge upon the executive or legislative branches. Such a decision would apply only to the specific parties in the case, and any relief would likewise be limited. This does not present a *Schroder* problem whereby the court is "re-formulat[ing] national policies"[253] by *requiring the federal government* to alter many federal programs to "maintain market conditions."[254] The plaintiffs' public nuisance suit is more like *Gordon*, where the court found that because the land owners' request for injunctive relief to fill the federally permitted fish pass did not require any action on the part of the federal government, a judicial decision to order injunctive relief would not "create a conflict with the federal government."[255] Here, the plaintiffs sought a common law remedy to be implemented by a common law court. In a public nuisance tort suit, "[t]he department to whom this issue has been 'constitutionally committed' is . . . the Judiciary,"[256] and the court should not shirk its responsibility to hear this "case or controversy."[257]

Second, broadly framing the issue to ask whether a "strict scheme to reduce pollution rapidly" outweighs the economic implications of such a "strict" scheme presents a "factor two" problem of a "lack of judicially discoverable and manageable standards."[258] Of course a court cannot "discover and manage" a scheme to reduce pollution if there are no parameters placed on the "pollution" it is trying to reduce. As the Tenth Circuit noted in *Schroder*, "[c]ourts are ill-equipped to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency."[259] The same is true with respect to broad environmental regulation.

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250. *Id.* at 1174.

251. *Am. Elec. Power*, 406 F. Supp. 2d at 272. It is questionable whether the United States is actually "negotiating" with other nations since the current international partnerships all focus on researching and developing new technologies rather than on reducing the existing level of emissions. *See supra* notes 71-72 and accompanying text.

252. *Schroder*, 263 F.3d at 1174.

253. *Id.* at 1176.

254. *Id.* at 1172.

255. Gordon v. Texas, 153 F.3d 190, 194-95 (5th Cir. 1998).

256. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991).

257. U.S. CONST. art. III, § 2, cl. 1.

258. Baker v. Carr, 369 U.S. 186, 217 (1962).

259. *Schroder*, 263 F.3d at 1175.

Likewise, there are no judicially discoverable and manageable standards to determine the effect of a "strict scheme to reduce pollution" on national security because the court does not have access to the proper information relating to national security.[260]

However, the plaintiffs have not requested relief in the form of a broad regulatory scheme. The plaintiffs' public nuisance claim seeks an injunction limiting the carbon emissions of the *named* defendants.[261] If the court defines the pollution as "carbon dioxide emissions from *these five defendants*," it can discover whether those defendants are polluting, how they are polluting, and how much.[262] The court can also discover the potential economic impact of a scheme to reduce the pollution *of those five defendants*. As the Second Circuit stated in *Klinghoffer*, common law tort principles provide "clear and well-settled rules on which the district court can easily rely."[263] By framing the issue more narrowly, the second *Baker* factor is no longer a major problem.

The third *Baker* factor also becomes a problem if the issue is framed broadly. The district court identified the question as "'an environmental policy question with sweeping implications for the nation's economy, its foreign relations, and even potentially its national security.'"[264] The court asserted that it was being asked to decide this question "without an 'initial policy determination' first having been made by the elected branches."[265] The characterization of the issue as "an environmental policy question" implicates the third *Baker* factor by definition. Additionally, the decision to broadly mandate a "strict scheme to reduce pollution rapidly" to all who might release pollutants would be both inappropriate and impossible for a federal court to implement "without an initial policy determination of a kind clearly for nonjudicial discretion."[266]

Conversely, a decision to limit pollution of a certain type, amount, and source which is causing a specific harm does not require an "initial policy determination of a kind *clearly for nonjudicial discretion*."[267] It requires the sort of policy determination that courts make all the time. As discussed above, the Supreme Court has heard several public nuisance cases involving pollution,[268] and a cursory overview of the Reporter's Notes accompanying section 826 of the

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260. *See, e.g.*, DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973).

261. Complaint, *supra* note 15, at 49.

262. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (holding a defendant landowner liable for a public nuisance for failing to clean up a hazardous waste site). The court found that "several crucial facts [were] undisputed: the tanks [had] leaked and [were] corroding; the groundwater [had] been contaminated; and Shore [was] unwilling and unable to transform the site into a stable, licensed storage facility." *Id.* at 1051.

263. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991).

264. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271 (S.D.N.Y. 2005) (quoting Transcript of Oral Argument at 6:1-6:5).

265. *Id.* at 272-73.

266. Baker v. Carr, 369 U.S. 186, 217 (1962).

267. *Id.* (emphasis added).

268. *See supra* notes 33-45 and accompanying text.

Restatement (Second) of Torts indicates that courts do not hesitate to balance the gravity of harm caused by an activity against the utility of the conduct in a nuisance action.[269] Moreover, "an initial policy determination is unnecessary when there are judicially manageable standards to guide the Court's decision."[270]

The Supreme Court undertook such a task in *Tennessee Copper* when it ordered an injunction to cap sulphur emissions to prevent the release of noxious gases and the destruction of vegetation.[271] It was not sufficient for the Court to simply order an injunction and walk away. Initially, the Court gave the smelting companies time to install purifying technology and negotiate a settlement with Georgia.[272] After evidence showed that the sulphur reduction technology did not sufficiently reduce emissions, Georgia returned to the Court seeking the injunction.[273] The Court considered the interests of the defendant smelting companies, the interests of the State of Georgia, available purifying technology, and the available data on sulphur emissions in reaching its decision.[274] The Court found that the only way to prevent injury to Georgia was to order a hard cap on sulphur emissions at twenty tons per day in the summer months and a reporting and monitoring regime including a court-appointed inspector.[275] The Court did not hesitate to consider complex scientific data and balance competing interests in *Tennessee Copper*, and it was quite willing to make the "initial policy determination" to provide relief to the injured State.[276]

Although the district court in *American Electric Power* did not specifically cite the fourth, fifth, or sixth *Baker* factors, it appeared to be particularly sensitive to congressional and executive *inaction* with respect to regulation of carbon dioxide.[277] The court reasoned that "[t]he explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions" confirm that the political branches should make the initial policy determination addressing global climate change.[278]

Is this an argument that the adjudication of *American Electric Power* in a

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269. RESTATEMENT (SECOND) OF TORTS § 826, reporter's notes (1979).

270. Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 686-87 (E.D. La. 2006).

271. Georgia v. Tenn. Copper Co., 237 U.S. 474, 475 (1915).

272. *Id.* at 474.

273. *Id.*

274. *Id.* at 474, 477.

275. *Id.*

276. *Id.*

277. The court went to some length to describe the history of climate change politics in the United States in the "background" section of the opinion. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268-70 (S.D.N.Y. 2005). It cited current Bush Administration policy that "'emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change.'" *Id.* at 270 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,933 (Sept. 8, 2003)).

278. *Am. Elec. Power*, 406 F. Supp. 2d at 274.

federal court would express a "lack of the respect due coordinate branches of government" or lead to potential "embarrassment from multifarious pronouncements by various departments on one question"?[279] If so, the district court need not worry. It does not follow that if an activity is not proscribed by statute, it cannot be deemed a public nuisance.[280] Tortious conduct is not contingent upon legislative proscription. For example, in *Gordon*, the federal government had specifically permitted the fish run that was causing erosion.[281] The Fifth Circuit did not, however, find that issuing an injunction to fill the federally permitted fish run would "abrogate any significant federal policies."[282] Likewise in *Tennessee Copper* the defendants were engaged in lawful smelting operations, but the Supreme Court still enjoined the emission of sulphur.[283]

The Second Circuit has stated that "[t]he fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."[284] An injunction capping carbon dioxide emissions of the *specific defendant utilities* does not meet this standard. First, the plaintiffs have argued that the executive branch has expressed a policy in favor of reducing carbon dioxide emissions (through voluntary measures) when President George H.W. Bush signed the United Nations Framework Convention on Climate Change ("UNFCCC"), and Congress expressed its agreement when it ratified the treaty.[285] The current administration has expressed a policy that encourages research and the advancement of new technologies to address climate change.[286] Second, the argument that a judicial ruling would undermine the President's policy to negotiate with the international community does not hold water because the President is *not* currently engaging in international discussions to impose mandatory limits on existing sources of carbon dioxide emissions.[287] There simply is no concern that a judicial decision to enjoin carbon dioxide emissions of five defendant utilities would "express[] a lack of the respect due coordinate branches of government."[288]

Although global warming is a "politically charged issue," the plaintiffs' claim does not present a non-justiciable political question. The case does not fall into any of the typical categories in which the political question doctrine has been

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279. Baker v. Carr, 369 U.S. 186, 217 (1962).

280. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 101 (1972). The reason Illinois brought a common law nuisance action to abate Milwaukee's water pollution was that there was no statute that proscribed Milwaukee's specific activity. *Id.*

281. Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998).

282. *Id.* at 194-95.

283. Georgia v. Tenn. Copper Co., 237 U.S. 474, 477 (1915).

284. Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

285. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 273-74 (S.D.N.Y. 2005).

286. Council on Environmental Quality, *supra* note 70.

287. *See supra* notes 70-72 and accompanying text.

288. Baker v. Carr, 369 U.S. 186, 217 (1962).

invoked, such as voting/political gerrymandering, treaty-making authority, war and peace, or certain matters involving foreign policy. Contrary to the district court's description of the case as "'an environmental policy question with sweeping implications for the nation's economy, its foreign relations, and even potentially its national security,'"[289] the plaintiffs sought a remedy that is limited to the injurious conduct of the specific defendants named in the suit. When the issue presented in *American Electric Power* is framed properly, it does not violate any of the *Baker* factors and does not present a non-justiciable political question.

CONCLUSION

By dismissing *American Electric Power* as a non-justiciable political question, the district court made a bold statement reflecting its opinion about the role (or lack thereof) of the courts with respect to global climate change. However, the plaintiffs did not ask the court to engage in a broad discussion of global climate change. They simply asked the court to evaluate whether the injuries allegedly caused by the defendants' carbon dioxide emissions amounted to an unreasonable interference with a public right. For this reason, the district court's decision to dismiss the plaintiffs' public nuisance action on political question grounds should be overturned.

Given how the district court went out of its way to frame *American Electric Power* in such a way as to create a political question, the phrase "outcome-based-jurisprudence" comes to mind. Cases are certainly more susceptible to outcome-based-jurisprudence when both the defendants and the plaintiffs can present valid arguments because, very often, the outcome is determined by the way in which the issue is framed.

American Electric Power raises other "pre-merits" issues including foreign affairs preemption, preemption/displacement of federal common law, and standing, and there are legitimate arguments on both sides of each issue. Therefore, the Second Circuit could very easily reason its way to its desired outcome on any of these issues by framing the plaintiffs' request for relief either as a broad policy question or as a more narrow issue of liability in tort. The Second Circuit may very well find that the plaintiffs have failed to overcome one of these hurdles. Hopefully the court will make such a determination *after* it properly frames the plaintiffs' claims.

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289. *Am. Elec. Power*, 406 F. Supp. 2d at 271 (quoting Transcript of Oral Argument at 6:1-6:5).

WHEN POLICIES COLLIDE: CITIZENSHIP DOCUMENTATION REQUIREMENTS AND BARRIERS TO OBTAINING PHOTO IDENTIFICATION—THE NEW MEDICAID CITIZENSHIP REQUIREMENT AS A CASE ILLUSTRATION

MEREDITH A. DEVLIN*

INTRODUCTION

Federal and state legislatures have been increasingly eager to implement legislation requiring photo identification in order to access various programs,[1] services, and even to exercise fundamental rights, such as voting.[2] Likely motivated by pressure to crack down on illegal immigration[3] and often masked with concerns of fraud,[4] these statutes have appeared at the federal level and in states across the country overnight. But what happens when a person is unable to obtain the required photo identification?

The new photo identification requirement statutes have many implications, one of which is illustrated by the new federal Medicaid citizenship requirement.[5] One example of a barrier some disabled Indiana residents will face attempting to meet this new requirement is an inability to physically access the state Bureau of Motor Vehicles ("BMV") branches to obtain the required identification.

This new federal policy collides with the BMV's policy, which requires individuals to personally visit a BMV facility to obtain state-issued identification cards.[6] Under the Medicaid citizenship requirement, most individuals will need a state-issued identification card because they will be required to prove identity in addition to citizenship.[7] They will be subject to the proof of identity requirement because it is unlikely they will possess one of the "primary" sources of identification outlined in the Medicaid citizenship requirement.[8] However, many severely disabled individuals are not able to physically visit an Indiana BMV branch due to restricted mobility or frail health, which is currently the only mechanism for obtaining state-issued identification cards. Failure to comply with

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1. *See, e.g.*, Deficit Reduction Act of 2005, 42 U.S.C.A. § 1396b(x) (West Supp. 2007) (implementing photo identification requirements for applicants and recipients of Medicaid).

2. *See, e.g.*, IND. CODE § 3-10-1-7.2 (Supp. 2006) (requiring Indiana voters to present a photo identification prior to casting their ballots).

3. *See infra* note 57 and accompanying text.

4. *See infra* note 57 and accompanying text.

5. 42 U.S.C.A. § 1396b(x).

6. *See infra* note 98 and accompanying text for a discussion of this requirement.

7. *See infra* notes 73-74 and accompanying text for a discussion of this requirement.

8. *See infra* notes 68-70 and accompanying text for a discussion of the "primary" sources of identification.

this rule results in a severe consequence: denial or loss of crucial Medicaid benefits.[9]

Further, there are possible Americans with Disabilities Act ("ADA") implications of the BMV's current policy, namely the requirement of reasonable accommodation. Increasing access for disabled individuals to state-issued identification cards will not only prevent the denial and discontinuation of Medicaid benefits for these individuals, but will also help ensure that disabled individuals can participate fully in any program or activity that requires photo identification. It will also protect the state from potential ADA Title II lawsuits.

However, before one begins to fully understand the current issue, a grasp of the relevant policies and procedures of all of these programs and services is necessary. Part I of this Note discusses the basics of the Medicaid, Medicare, Supplemental Security Income, and Social Security Disability programs, which is necessary to understand the concepts discussed later in the Note. Part II discusses the first policy in the collision of policies: the Medicaid citizenship requirement. Part III discusses the second policy, the Indiana BMV requirements for obtaining a state-issued photo identification card. Part IV discusses how Indiana BMV's policy violates the ADA, and Part V outlines policy recommendations designed to remedy the disconnect between the two policies.

I. The Basics of Medicaid, Medicare, Supplemental Security Income, & Social Security Disability Insurance

Before the practical implications of the Medicaid citizenship requirement can be fully understood, a working knowledge of the Medicaid, Medicare, Supplemental Security Income ("SSI"), and Social Security Disability ("SSDI") programs and their eligibility requirements is necessary. The following sections provide a broad overview of each of these programs.

A. Medicaid Basics

In the most basic sense, Medicaid provides health insurance to the poor. Often confused with Medicare,[10] Medicaid is a federal and state governmental program that currently provides both healthcare and long-term care coverage for more than fifty-five million people living in the United States.[11] This figure includes six million seniors and eight million disabled individuals.[12] Unlike Medicare, which does not have financial eligibility requirements, applicants for and recipients of Medicaid "must meet financial criteria and also belong to one

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9. *See infra* Part II.

10. *See infra* Part I.B.

11. Kaiser Commission on Medicaid and the Uninsured, The Medicaid Program at a Glance (2007), http://www.kff.org/medicaid/upload/7235-02.pdf. "[T]he Kaiser Family Foundation is a non-profit, private operating foundation focusing on the major health care issues facing the U.S., with a growing role in global health." About the Kaiser Family Foundation, http://www.kff.org/about/index2.cfm (last visited Nov. 4, 2007).

12. Kaiser Commission on Medicaid and the Uninsured, *supra* note 11.

of the groups that are 'categorically eligible' for the program: children, parents of dependent children, pregnant women, people with disabilities, and the elderly."[13]

The federal requirements for the Medicaid program are contained in Title XIX of the Social Security Act.[14] The Act outlines requirements states must fulfill in order to receive federal funding for the program.[15] States are not required by the statute to have a Medicaid program; however, every state has opted to have a Medicaid program[16] due to federal financial reimbursement incentives. Federal law outlines the minimum standards for the Medicaid program, but states have the authority to broaden eligibility if so desired.[17] Thus, state Medicaid programs are not exact replicas of one another.[18]

In 2003, Indiana provided Medicaid services to nearly one million individuals, 81,300 of which were seniors and 131,800 of which were blind or disabled.[19] Eligibility for Medicaid in Indiana is determined by the county Division of Family Resources office.[20] To qualify for Medicaid in Indiana in 2006, an individual's income generally could not exceed $603 per month, and a couple's income could not exceed $904 per month.[21] However, it is possible for individuals in Indiana to qualify for Medicaid even if their incomes exceed these amounts. Indiana has a provision entitled Medicaid "spend down" that allows individuals who are over the state's income guidelines to qualify for Medicaid if their medical expenses exceed their spend down obligations.[22] The spend down obligation is "the amount of any excess monthly income remaining in the eligibility determination."[23] For example, based on the 2006 guidelines, if an individual's income is $653 per month, his or her monthly spend down will be $50 per month because his or her income is $50 over the income guideline for an

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13. *Id.*

14. ROBIN RUDOWITZ & ANDY SCHNEIDER, THE NUTS AND BOLTS OF MAKING MEDICAID POLICY CHANGES: AN OVERVIEW AND A LOOK AT THE DEFICIT REDUCTION ACT 4 (2006), http://www.kff.org/medicaid/upload/7550.pdf. The Medicaid provisions can be found in the Social Security Act at 42 U.S.C.A. § 1396(b) (West Supp. 2007).

15. RUDOWITZ & SCHNEIDER, *supra* note 14, at 4.

16. *Id.*

17. KAISER COMMISSION ON MEDICAID AND THE UNINSURED, *supra* note 11.

18. State Medicaid programs vary in eligibility guidelines and extent of coverage. *Id.*

19. Kaiser State Health Facts, State Medicaid Fact Sheet: Indiana & United States, http://www.statehealthfacts.org/mfs.jsp?rgn=16&rgn=1&x=6&y=4 (last visited Nov. 4, 2007).

20. *See* 405 IND. ADMIN. CODE 2-1-2 (2002).

21. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION, INDIANA CLIENT ELIGIBILITY SYSTEM (ICES) MANUAL § 3010.20.05 (2007), *available at* http://www.in.gov/fssa/files/3000.pdf. The ICES Manual is the program policy manual used by the Indiana Division of Family Resources offices. Indiana Family & Social Services Administration, Program Policy Manual for Cash Assistance, Food Stamps and Health Coverage, http://www.in.gov/fssa/dfr/6389.htm (last visited Nov. 4, 2007). This manual is developed based on state and federal laws and regulations. *Id.*

22. 405 IND. ADMIN. CODE 2-3-10 (Supp. 2007).

23. *Id.*

individual. The spend down amount is the amount of medical expenses a person must pay for out-of-pocket before the individual can begin receiving health coverage through the Medicaid program.[24] Thus, it is possible for an individual with very large medical expenses to have Medicaid coverage, even if his or her income significantly exceeds the income guidelines.

It is important to note that, in Indiana, a person is not automatically granted Medicaid benefits once that person is found to be eligible for SSI benefits.[25] The individual will only be eligible for Medicaid if he or she "meets the income and resource requirements established by statute or the office unless the state is required to provide medical assistance to the individual under [a provision of the Social Security Act]."[26] Additionally, the Indiana Medicaid program requires disabled persons applying for assistance to undergo a determination of whether or not the person is disabled according to Indiana standards.[27] A prior disability determination by the Social Security Administration necessary to receive SSI benefits or SSDI benefits will not suffice.[28]

B. Medicare Basics

Similar to Medicaid, Medicare also provides health insurance benefits.[29] Medicare is available to persons who are over sixty-five years old, disabled, or have End-Stage Renal Disease.[30] In general, to be eligible for Medicare, a person must have worked at least ten years in employment covered by Medicare, be at least sixty-five years old, and be a United States citizen or permanent resident.[31] An individual who does not have enough work credits to qualify for Medicare

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24. *Id.*

25. *See id.* 2-1-2 ("[E]ach applicant for and recipient of medical assistance or the individual authorized to act in the individual's behalf must be interviewed by the county office at the time of initial investigation and at each annual reinvestigation of eligibility."). SSI benefits are discussed *infra* Part I.C.

26. IND. CODE § 12-15-2-6 (2004).

27. 405 IND. ADMIN. CODE 2-2-3 (Supp. 2007). "The determination of whether an applicant or recipient is disabled according to the definition of disability prescribed in IC 12-14-15-1(2) is made by the Medicaid medical review team . . . ." *Id.*

28. See *infra* Part I.C-D and accompanying text for an overview of the eligibility requirements for the SSI and SSDI programs.

29. Medicare.gov, Medicare Eligibility Tool, http://www.medicare.gov/MedicareEligibility/Home.asp?dest=NAV|Home|GeneralEnrollment#TabTop (last visited Nov. 4, 2007). However, it is important to note that Medicare is *not* based on a person's income; it is not "needs based." *Id.* Additionally, Medicare coverage is not "total" healthcare coverage, and it is not as extensive as Medicaid coverage. *Id.* For example, Medicare does not pay for long-term nursing home care, nor does it pay for long-term home health care services. *Id.* Additionally, Medicare Part B, which covers out-patient healthcare services, is not "free." *Id.* An individual must pay a monthly premium to receive Medicare Part B. Medicare Part A is simply hospital insurance. *Id.*

30. *Id.*

31. 42 U.S.C. § 426(a) (2000).

can qualify for Medicare based upon his or her spouse's work credits once he or she turns sixty-five years old.[32] Additionally, a person who receives either the Social Security or Railroad Retirement Board disability payments for at least two years can also receive Medicare.[33] Thus, unlike Medicaid, Medicare is not based on any financial criteria and is most often associated with seniors.

C. Supplemental Security Income Basics

As the title of the benefit connotes, the SSI program provides supplemental income[34] through monthly payments to low-income individuals over age sixty-five, as well as blind and disabled individuals.[35] To qualify for SSI due to disability, an individual must meet the federal Social Security regulation's definition of "disabled."[36] The program is similar to Medicaid in that eligibility for SSI is determined by an individual's income and resources.[37] "The basic SSI amount is the same nationwide."[38]

The SSI benefit amounts for 2007 were as follows: an individual living alone or paying his or her share of living costs could receive up to $623, and a couple in that same situation could receive up to $934.[39] For example, if an individual living alone who qualifies for SSI has monthly income of $500 per month, SSI would "supplement" that income by providing the individual with $123 per month. The resource[40] limits for 2007 were $2000 for an individual and $3000 for a couple.[41] In 2005, 5.8 million disabled persons and 1.2 million seniors received SSI benefits.[42]

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32. *Id.* § 426(a)(2)(A). In order for a spouse to obtain Medicare under this provision, he or she must be entitled to receive Social Security benefits based on his or her spouse's work credits. *Id. See also id.* § 402(b) (outlining the eligibility criteria for Social Security Retirement benefits for spouses).

33. *Id.* § 426.

34. It is important to note that for most SSI recipients, SSI is the *only* income they receive.

35. 20 C.F.R. § 416.202 (2007).

36. *Id.* § 416.905. Disability is defined "as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.*

37. *Id.* § 416.203.

38. SOCIAL SECURITY ADMINISTRATION, SUPPLEMENTAL SECURITY INCOME (SSI) 4 (2007), *available at* http://www.ssa.gov/pubs/11000.pdf.

39. Social Security Online, Understanding Supplemental Security Income (SSI)—General Information, http://www.socialsecurity.gov/ssi/text-general-ussi.htm (last visited Nov. 4, 2007).

40. "Resources means cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for support and maintenance." 20 C.F.R. § 416.120(c)(3) (2007) (citation omitted).

41. Social Security Online, *supra* note 39.

42. SOCIAL SECURITY ADMINISTRATION, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2006, at 309 (2007), *available at* http://www.socialsecurity.gov/policy/docs/

D. Social Security Disability Insurance Basics

Often confused with SSI, SSDI "pays benefits to people who cannot work because they have a medical condition that is expected to last at least one year or result in death."[43] Social Security does not pay benefits to individuals due to partial or short-term disability.[44] Similar to SSI, individuals must meet the federal Social Security regulation's definition of "disability" in order to qualify for this benefit.[45] Additionally, a person cannot qualify for SSDI if he or she has not met the earnings requirements.[46] SSDI is what is commonly referred to as "disability."[47]

Additionally, a person must have worked a certain amount of time and paid Social Security taxes in order to qualify for this benefit.[48] There are two different earnings "tests" that must be met before a person qualifies for SSDI.[49] One test is called the "recent work" test, which is based on a person's age at the time he or she becomes disabled; the other test is the "duration of work" test, which is used to determine if a person has met the work duration requirement under Social Security.[50] In sum, due to these earnings tests, only disabled individuals who have worked and paid Social Security taxes are eligible to receive SSDI.

E. Putting the Pieces of the Puzzle Together: A Summary of the Interrelationship of the Benefit Programs

It is not uncommon for confusion to exist among practitioners concerning these benefit programs. However, a working knowledge of the interrelationship of these programs is useful to understanding the forthcoming discussion. The following is a brief summary of how all of the programs mentioned above fit together and how they relate to disabled individuals.

Medicare and Medicaid are separate and distinct health benefit programs. It is possible for a person to qualify for and receive both Medicare and Medicaid. Additionally, it is possible for a person in Indiana who exceeds the income requirements for Medicaid to still qualify for the program under the "spend

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statcomps/supplement/2006/supplement06.pdf.

43. SOCIAL SECURITY ADMINISTRATION, DISABILITY BENEFITS 2 (2006), *available at* http://www.ssa.gov/pubs/10029.pdf. It is important to note that SSDI is not the same as Social Security retirement benefits or survivor benefits, which do not require any type of physical disability for individuals to be eligible for the benefits. Social Security retirement benefits or survivor benefits are what laypersons typical simply refer to as "Social Security."

44. *Id.*

45. 20 C.F.R. § 404.315 (2007).

46. *Id.*

47. For example, it is not uncommon to hear someone receiving SSDI benefits to say, "I'm on disability."

48. 20 C.F.R. § 404.315.

49. SOCIAL SECURITY ADMINISTRATION, *supra* note 43, at 3.

50. *Id.*; *see also* 20 C.F.R. § 404.130 (2007).

down" provision. It is also important to point out that because a person must pay Medicare taxes in order to later receive the Medicare benefit, many older adults and disabled individuals do not qualify for Medicare. Some of these individuals might have worked in employment that did not withhold Medicare taxes, or some individuals might have been domestic workers for a private family.

The SSI program has strict income and resource guidelines, and only those individuals who meet those guidelines will qualify for the program. Thus, because of the Medicaid "spend down" provision, it is possible for a disabled person to qualify for Medicaid but not qualify for SSI benefits.

Because of the work requirements under the SSDI program, not every disabled individual receives SSDI, and if an individual does not meet the income criteria for the SSI program previously discussed, it is possible that an individual, even if severely disabled, would not receive any benefits through the Social Security Administration. For example, a parent may set up a special needs trust for a disabled child that pays income to the child.[51] This income would likely disqualify the child, now an adult, from the SSI program because of the income criteria.[52] However, this adult child could still qualify for Medicaid under the "spend down" provision.

II. POLICY #1: THE MEDICAID CITIZENSHIP REQUIREMENT

The Medicaid citizenship requirement was enacted as just one provision of the Deficit Reduction Act of 2005 ("DRA"),[53] which went into effect on July 1, 2006.[54] In general, the Act requires Medicaid applicants and recipients to provide documentation of United States citizenship or nationality.[55] While individuals eligible for Medicare, SSI, and SSDI are exempt from the requirements, those who do not qualify for those programs will be left out in the cold. They will be required to provide documents they do not have.

The following sections highlight the documentation requirements of the DRA, as well as the events that lead up to a recent statutory amendment, which

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51. Electronic Mail Interview with Dennis Frick, Director, Indiana Legal Services Senior Law Project (Jan. 11, 2007) (on file with author).

52. *Id.*

53. Deficit Reduction Act of 2005, 42 U.S.C.A. § 1396b(x) (West Supp. 2007).

> Section 6036 of the DRA creates a new section 1903(x) of the Act that prohibits Federal financial participation (FFP) in State expenditures for medical assistance with respect to an individual who has declared . . . to be a citizen or national of the United States unless the State obtains satisfactory documentary evidence of citizenship or a statutory exemption applies.

Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,215 (proposed July 6, 2006) (to be codified at 42 C.F.R. pts. 435, 436, 440, 441, 457, and 483).

54. CENTER ON BUDGET AND POLICY PRIORITIES, THE NEW MEDICAID CITIZENSHIP REQUIREMENT: A BRIEF OVERVIEW 1 (2006), http://www.cbpp.org/4-20-06health.pdf.

55. Centers for Medicare & Medicaid Services, Proof of Citizenship, http://www.cms.hhs.gov/MedicaidEligibility/05_ProofofCitizenship.asp#TopofPage (last visited Jan. 4, 2008).

exempts some Medicaid applicants and recipients from the citizenship requirement. Furthermore, this Note discusses the impact of the DRA on the severely disabled population.

A. The Deficit Reduction Act of 2005

As its title implies, the purpose of the DRA is to reduce the federal deficit. In an effort to achieve this goal, the DRA "contains a large number of changes in Medicaid policy which are expected to reduce federal Medicaid spending by $28.3 billion over the next ten years."[56] One of these changes is the Medicaid citizenship requirement. This new requirement "was intended by its sponsors to keep illegal immigrants from fraudulently enrolling in Medicaid."[57] However, "the requirement's main impact is likely to be to impede or delay coverage for significant numbers of *eligible U.S. citizens*."[58]

A citizenship requirement is not new to the Medicaid program.

> Since enactment of the Immigration Reform and Control Act of 1986 . . . , Medicaid applicants and recipients have been required by . . . the Social Security Act . . . to declare under penalty of perjury whether the applicant or recipient is a citizen or national of the United States, and if not a citizen or national, that the individual is an alien in a satisfactory immigration status.[59]

What the DRA changes, however, is that "[s]elf-attestation of citizenship and identity is no longer an acceptable practice."[60] Medicaid applicants and recipients must now supply documentary evidence of citizenship in addition to making declarations that they are United States citizens.[61] Failure to comply with this requirement will result in a state losing its federal Medicaid funding.[62] The required documentation must be presented upon initial application to the Medicaid program for applicants or during the first redetermination screening after July 1, 2006, for current recipients.[63] If an applicant or recipient does not comply with the Medicaid citizenship requirement, he or she can be denied or

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56. RUDOWITZ & SCHNEIDER, *supra* note 14, at 4.

57. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 1.

58. *Id.*

59. Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,215 (proposed July 6, 2006) (to be codified at 42 C.F.R. pts. 435, 436, 440, 441, 457, and 483) (citations omitted).

60. *Id.*

61. *Id.*

62. *Id.* at 39,217 ("FFP will not be available for State expenditures for medical assistance if a State does not require applicants and recipients to provide satisfactory documentary evidence of citizenship, or does not secure this documentary evidence which includes the responsibility to accept only authentic documents on or after July 1, 2006.").

63. *Id.* at 39,215.

terminated from the Medicaid program.[64]

Prior to the enactment of this legislation, many states, including Indiana, already required documentation and verification of citizenship for Medicaid applicants and recipients.[65] However, Indiana did not require applicants or recipients to provide identity documentation in addition to the citizenship documentation, nor was a hierarchy of acceptable documentation established.[66]

1. The Documentation Process & Requirements.—The federal regulations outline what documentation is acceptable to fulfill the Medicaid citizenship requirement for those individuals who are not subject to an exemption. A hierarchy of acceptable documentation was established based upon reliability.[67] If an individual provides documentation that falls under the "primary evidence" category, such documentation will satisfy *both* the citizenship *and* identity documentation requirements of the DRA.[68] The documents considered "primary evidence" of citizenship include: U.S. passport, Certificate of Naturalization, and Certificate of U.S. Citizenship.[69] Additionally, the regulation provides that a valid state driver's license will satisfy this requirement, "but only if the State issuing the license requires proof of U.S. citizenship before issuance of such license or obtains a social security number from the applicant and verifies before certification that such number is valid and assigned to the applicant who is a citizen."[70] This provision, however, will not be effective until a state follows the

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64. *Id.* at 39,217 ("An applicant or recipient who fails to cooperate with the State in presenting documentary evidence of citizenship may be denied or terminated."). "Failure to provide this information is no different than the failure to provide any other information which is material to the eligibility determination." *Id.*

65. *See* INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION, INDIANA CLIENT ELIGIBILITY SYSTEM (ICES) MANUAL § 2402.15.00 (2002) (revised by ICES PROGRAM POLICY MANUAL TRANSMITTAL 41, *available at* http://www.in.gov/fssa/files/iceschange41.pdf).

66. *Id.* It is important to mention that even though the policy manual did not require identity documentation for Medicaid applicants and recipients, the Food Stamp program, which is administered by the same state agency, did (and still does) require identity documentation for its applicants and recipients. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION, INDIANA CLIENT ELIGIBILITY SYSTEM (ICES) MANUAL § 2408.05.00 (2007), *available at* http://www.in.gov/fssa/files/2400.pdf. Nevertheless, the requirements for identity verification in the Food Stamp program are more flexible than the new requirements under the DRA. For example, Indiana permits the following documents which are not permitted by the DRA: work identification card, voter registration card, wage stubs, birth certificate, and health benefits identification for any assistance or social services program. *Id.* Many eligible Medicaid applicants and recipients are also eligible for Indiana's Food Stamp program. However, the identity requirements for Medicaid are now stricter than such requirements for the Food Stamp program.

67. Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. at 39,218.

68. 42 C.F.R. § 435.407 (2007).

69. *Id.*

70. *Id.*

above-listed criteria.[71] No state, including Indiana, currently meets this criteria.[72]

If a person does not possess one of the listed documents in the "primary evidence" category, then that individual will be required to submit documentation of *both* citizenship[73] *and* identity.[74] The documents acceptable for proof of identity include:

> (I) Driver's license issued by a State or Territory either with a photograph of the individual or other identifying information such as name, age, sex, race, height, weight, or eye color.
> (ii) School identification card with a photograph of the individual.
> (iii) U.S. military card or draft record.
> (iv) Identification card issued by the Federal, State, or local government with the same information included on drivers' licenses.
> (v) Military dependent's identification card.
> (vi) Native Tribal document. . . .
> (vii) U.S. Coast Guard Merchant Mariner Card.[75]

A voter registration card or Canadian driver's license will not be accepted as proof of identity.[76] Most of the above-listed documents are only available to certain categories of people. The only accepted identity documentation that every U.S. citizen is eligible for is a state-issued identification card. Consequently, if a disabled individual does not have a Passport, he or she will need a state-issued identification card to prove identity—a document that can only be obtained through the BMV.

2. The Interim Citizenship Regulation & Subsequent Statutory Amendment—Exemptions to the Citizenship Requirement.—Some Medicaid applicants and recipients are exempt from the citizenship documentation requirements. An Interim Final Rule for the DRA, effective July 6, 2006, clarified the Medicaid

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71. *Id.*

72. *See id.* ("This provision is not effective until such time as a State makes providing evidence of citizenship a condition of issuing a driver's license and evidence that the license holder is a citizen is included on the license or in a system of records available to the Medicaid agency."); *see also* Indiana Bureau of Motor Vehicles: FAQ—Identification Requirements, http://www.in.gov/bmv/3496.htm (last visited Jan. 4, 2008).

73. Secondary evidence of citizenship includes items such as "[a] U.S. public birth certificate," "[a] Certification of Report of Birth," "Report of Birth Abroad of a U.S. citizen," "Certification of birth issued by the Department of State," "[a] U.S. Citizen I.D. card," "[a] Northern Mariana Identification card," "[a]n American Indian card," "[a] final adoption decree showing the child's name and U.S. place of birth," "evidence of U.S. Civil Service employment before June 1, 1976," or a "U.S. Military Record showing a U.S. place of birth." 42 C.F.R. § 435.407 (2007). The regulations also provide for third and fourth levels of citizenship evidence. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

citizenship requirement.[77] The Rule provided there would be an exemption for persons entitled or enrolled in Medicare or persons receiving SSI benefits.[78] The new section of the Social Security Act added by the DRA provided for an exemption from the new citizenship requirement; however, the Interim Regulation states a drafting error occurred.[79]

> This section exempts an "alien" eligible for Medicaid and entitled to or enrolled in Medicare or eligible for Medicaid by virtue of receiving Supplemental Security Income (SSI) . . . . However, because aliens are not citizens and cannot provide documentary evidence of citizenship, this exemption, if limited to aliens, does not appear to have any impact.[80]

This exemption was instead likely intended to apply to citizens and nationals.[81] Thus, the regulation provided, "[I]n order to give meaning to the exemption, it is appropriate to treat the reference to 'alien' as a 'scrivener's error.'"[82] To give effect to the actual words used by Congress would "lead to absurd and counter-intuitive results."[83] The Rule went further stating:

> To adopt the literal reading of the statute could result in Medicare and SSI eligibles, a population which are by definition either aged, blind, or disabled, and thereby most likely to have difficulty obtaining documentation of citizenship, being denied the availability of an exemption which we believe the Congress intended to afford them.[84]

Congress later amended the statutory language itself to reflect the changes outlined by the Interim Rule.[85] The legislation amending the language was passed shortly before the 109th Congress closed its session.[86] In addition to codifying the Interim Rule's interpretation of the DRA, the amendment also exempted a new category of individuals from the DRA requirements: SSDI

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77. Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39,214, 39,214 (proposed July 6, 2006) (to be codified at 42 C.F.R. pts. 435, 436, 440, 441, 457, and 483).

78. *Id.* at 39,215-16.

79. *Id.* at 39,215.

80. *Id.*

81. *Id.*

82. *Id.* "Courts have employed the doctrine of correcting a 'scrivener's error' in order to correct obvious clerical or typographical errors." *Id.* The comments to the interim regulation cite Supreme Court decisions to support this assertion. *Id.* (citing Yates v. Hendon, 541 U.S. 1, 17-18 (2004); U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993); United States v. Brown, 333 U.S. 18, 27 (1948)).

83. *Id.*

84. *Id.* at 39,215-16.

85. National Senior Citizens Law Center, *Congress Tinkers with DRA*, NSCLC WASH. WKLY., Dec. 15, 2006, at 189.

86. *Id.* The "technical corrections" were included in the Tax Relief and Healthcare Act of 2006. *Id.* The Act can be found at Pub. L. No. 109-432, 120 Stat. 2922 (to be codified at 42 U.S.C. § 1396b(x)).

recipients.[87]

3. The Impact of the DRA.—While the DRA does provide an exemption to the Medicaid Citizenship Requirement for persons on Medicare, SSI, or SSDI, concern regarding the DRA's impact remains. There are many vulnerable populations, including disabled individuals who do not receive Medicare benefits, SSI, or SSDI, because they did not work long enough or are not poor enough, who are entitled to Medicaid under the spend down provision, who remain subject to the documentation requirements. These individuals will likely have great difficulty satisfying the requirement.[88] Prior to the passage of the DRA amendment that included an exemption for SSDI recipients,[89] "an estimated 38 million current Medicaid beneficiaries, as well as an additional 10 million applicants, [were] subject to the new [Medicaid citizenship] requirement."[90] This figure is astonishing because it is often assumed that most Medicaid recipients also receive other benefits such as SSI.[91] While there are no current figures highlighting the number of individuals who remain subject to the Medicaid citizenship requirement since the DRA was amended, it is likely the number remains significant due to the eligibility requirements for SSDI.[92]

The impact of the requirement on non-exempt disabled persons is of particular concern because they are the least likely population to be able to obtain the required identity documentation. Prior to the passage of the DRA amendment, of the 38 million persons not exempt from the citizenship documentation requirement, 750,000 were disabled persons.[93] The exact number of disabled persons in Indiana without Medicare, SSI, or SSDI is not known; however, given the national figures of disabled individuals without SSI or Medicare, the number is likely significant.

Assuming that most individuals do not possess one of the documents listed in the "primary evidence" category, such as a U.S. Passport, these individuals will be required to submit identity documentation in addition to citizenship documentation.[94] Additionally, if it is assumed that most individuals are not eligible for a majority of the documents accepted to prove identity, such as a school identification card, a U.S. military card, or a Native American Tribal document, then it can be assumed that most individuals will be required to document their identities with a state-issued driver's license or state

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87. National Senior Citizens Law Center, *supra* note 85, at 191. However, the exemption does *not* include "traditional" Social Security retirement or survivor beneficiaries. *See supra* note 43 and accompanying text for an explanation of "traditional" Social Security benefits.

88. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 1.

89. *See supra* notes 85-87 and accompanying text.

90. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 1.

91. See *supra* Part I.B-E for a discussion of the eligibility requirements of the programs and how individuals might qualify for Medicaid, but not qualify for the exempted programs.

92. See *supra* Part I.B-E for the eligibility requirements of the exempted programs.

93. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 2.

94. *See supra* text accompanying notes 67-74.

identification card.[95] However, many of these individuals will be unable to obtain the necessary identification card because the agency charged with providing this service, the BMV, does not have a policy in place to serve persons who cannot physically access the agency.

For example, imagine an eighty-three year old female in a nursing home facility. This woman never married, and she worked her entire life as a private housekeeper. She does not have Medicare because her job was not "Medicare covered" employment.[96] Now, she resides in a nursing home because she is no longer able to take care of herself after suffering a severe stroke. She also has dementia[97] as a result of the stroke. The woman uses a wheelchair to ambulate, but is unable to push the wheelchair on her own—she must ask a nurse or aide at the nursing home for help. None of her family lives nearby, and most of them have passed away. Her financial resources have been exhausted paying for her nursing home care. She must now apply for Medicaid. However, she cannot locate her photo identification card. It must have been lost in the move to the facility five years ago. She is unable to leave the nursing facility due to her frail health. She does not have a U.S. Passport or any of the other documents that are considered primary evidence of citizenship under the DRA. She will, thus, be required to prove *both* citizenship *and* identity. How is she going to get a photo identification card from the Indiana BMV in order to complete her Medicaid application?

III. POLICY #2: INDIANA'S REQUIREMENTS FOR OBTAINING STATE-ISSUED IDENTIFICATION CARDS

In order to obtain a driver's license or a state-issued identification card in Indiana, an individual must go in person to a local BMV branch.[98] A person cannot renew a license through the Internet.[99] Identification cards are available for Indiana residents who do not qualify for or need a driver's license.[100] "To obtain [a non-driver] ID card, the applicant must meet the requirements when proving his or her identity from the current acceptable ID list."[101]

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95. *See supra* text accompanying note 75.

96. *See supra* Part I.B.

97. Dementia is defined as "a usually progressive condition (as Alzheimer's disease) marked by deteriorated cognitive functioning often with emotional apathy." Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/dementia (last visited Nov. 13, 2007).

98. *See* IND. CODE § 9-24-9-1(a) (2004) ("The application must be presented in person."); *see also* § 9-24-16-2 (Supp. 2007) (requiring verification of applications for state-issued identification cards by authorized personnel); Indiana Bureau of Motor Vehicles: FAQ—Identification Requirements, *supra* note 72.

99. Indiana Bureau of Motor Vehicles: FAQ—Identification Requirements, *supra* note 72.

100. *Id.*

101. *Id.* Thus, applicants must provide proof of identity in order to obtain a state-issued identification card needed to prove identity for Medicaid purposes. This documentation criteria is very circular.

The BMV does provide one exception to the requirement that a person must physically visit a BMV local branch. A person may obtain a photo exempt driver's license if a person is out of the state or country due to U.S. military duty, business, college, or missionary work.[102] In order to apply for this special license, a person must complete a designated state form.[103] This form can also be used to apply for an identification card.[104] However, no exemption or special forms exist for individuals who cannot physically access the BMV.

Because there is no provision for persons who cannot physically access a state BMV branch to obtain a state-issued identification card, such persons will be unable to satisfy the identity requirement of the new Medicaid Citizenship Requirement. Medicaid applicants and recipients who are disabled to the point they are unable to physically travel to a local license branch will be the unfortunate victims of two incongruent policies because they do not have primary evidence of citizenship and will not be able to obtain the necessary state-issued photo identification card.

IV. The Collision of the Two Policies Creates a Problem with the Americans with Disabilities Act

The inaccessibility of the Indiana BMV to persons physically unable to access a local BMV branch due to disability violates Title II of the ADA.[105] The Indiana BMV violates this ADA provision because of its failure to reasonably accommodate these disabled individuals, which is required under the ADA regulations.[106] The Indiana BMV would not likely be able to assert a cost defense to avoid this violation.

A. The ADA Generally

The ADA is a powerful federal statute that "provides broad nondiscrimination protection in employment, public services, public accommodation and services operated by private entities, transportation, and telecommunications for individuals with disabilities."[107] Additionally, it is frequently touted as the "most sweeping nondiscrimination legislation since the Civil Rights Act of 1964."[108] Congress enacted the ADA after finally recognizing the systemic discrimination faced by disabled individuals and the gaps that existed in previous legislation.[109] The Act "was passed by large

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102. *Id.*

103. *Id.*

104. Request for Photo Exempt License/ID Temporary or Verification, Indiana State Form 45811, *available at* http://www.in.gov/icpr/webfile/formsdiv/45811.pdf.

105. Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165 (2000).

106. *See infra* Part IV.C-F.

107. Nancy Lee Jones, The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues 1 (2005), http://www.opencrs.com/rpts/98-921_20050613.pdf.

108. *Id.*

109. Tennessee v. Lane, 541 U.S. 509, 526 (2004) (citing S. Rep. No. 101-116, at 18 (1989)).

majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities."[110]

The ADA was influenced by many previous statutes. The same standards developed for the public sector by section 504 of the Rehabilitation Act[111] were expanded to include *both* the private and public sector by the ADA.[112] Additionally, the ADA borrowed standards from Titles II and VII of the Civil Rights Act of 1964 in developing its nondiscrimination standards.[113]
The intentions and goals of the ADA are clearly outlined. The preamble of the ADA explicitly states that the purpose of the Act is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> (3) to ensure that the Federal Government plays a central role in enforcing the standards . . . ; and
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[114]

B. The Rehabilitation Act of 1973 Compared to the Americans with Disabilities Act

The Rehabilitation Act of 1973 was the first statute aimed at preventing discrimination against disabled individuals.[115] "The definition of disability and much of the substantive provisions of Titles I, II, and III [of the ADA] are modeled on regulations implementing [s]ection 504 of the Rehabilitation Act."[116] Additionally, the language used in Title II of the ADA is virtually the same as section 504 of the Rehabilitation Act of 1973,[117] which "prohibits entities that

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110. *Id.* at 516.

111. 29 U.S.C. § 794 (2000).

112. RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 6 (2005).

113. *Id.*

114. 42 U.S.C. § 12101(b) (2000).

115. Jonathan M. Lave & Mitchell P. Zeff, *When Access to the Benefits of Public Services is Handicapped: An Analysis of the Seventh Circuit's Decision in* Wisconsin Community Service v. City of Milwaukee *and its Implications for Disabled Americans*, 2 SETON HALL CIRCUIT REV. 433, 443 (2006).

116. Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 8 GEO. J. ON POVERTY L. & POL'Y 1, 38 (2001).

117. COLKER, *supra* note 112, at 137. Section 504 of the Rehabilitation Act of 1973 is codified at 29 U.S.C. § 794 (2000).

receive federal financial assistance from discriminating on the basis of disability."[118]

Because the Indiana BMV does not receive federal funds, the Rehabilitation Act would not be directly applicable to the issue at hand. However, because the ADA was modeled after the Rehabilitation Act, the cases decided under the Act are helpful in an analysis of some of the key provisions of the ADA where case law might be sparse or non-existent.

C. A Brief Overview of Title II of the ADA

There are three main titles in the ADA that cover discrimination in the following areas: employment, public services, and public accommodation.[119] "[U]nder the ADA, one can bring suit only if one establishes that he or she is a member of the protected class as an individual with a disability."[120] Disability is defined by the Act as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[121]

Title II of the ADA focuses on public services. "ADA Title II covers nearly any program or activity conducted by a public entity ranging from higher education to prisons to public health care."[122] This title was enacted as a result of vast inequities in the treatment of disabled persons in state services and programs.[123] The text of the title reads: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[124]

Further, Title II provides definitions for the terms in the provision. A clear understanding of these terms is imperative to fully comprehending the ADA and its breadth. A public entity is defined as "(A) any state or local government; [or] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ."[125] Title II also clarifies who is protected by the provision by clearly defining what constitutes a qualified individual with a disability. A qualified individual with a disability is defined as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural,

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118. COLKER, *supra* note 112, at 20. In her book, Colker discusses in depth the inception of the ADA and its roots in section 504 of the Rehabilitation Act as well as the Civil Rights Act of 1964. See *id.* at 15-68 for further discussion.

119. *Id.* at 18-20.

120. *Id.* at 18.

121. 42 U.S.C. § 12102(2) (2000).

122. COLKER, *supra* note 112, at 20.

123. Tennessee v. Lane, 541 U.S. 509, 524 (2004).

124. 42 U.S.C. § 12132 (2000).

125. *Id.* § 12131(1).

> communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[126]

The promulgated regulations of Title II clearly specify what responsibilities public entities have to disabled individuals. First, the regulation requires public entities to reasonably accommodate disabled individuals.[127] Public entities must reasonably accommodate disabled individuals by "mak[ing] reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[128] A public entity is also not required to make modifications that would result in "undue financial and administrative burdens."[129] However, it is important to note that this reference to "undue financial and administrative burdens" is found in the regulation concerning existing facilities.[130]

The regulations give public entities leeway in determining methods to implement reasonable modifications to existing facilities,[131] which makes it more difficult for public entities to claim an undue burden. The regulation states:

> A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, *assignment of aides to beneficiaries*, *home visits, delivery of services at alternate accessible sites*, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, *or any other methods* that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.[132]

The regulation provides flexibility to public entities by offering several alternatives for reasonably modifying a program or service. A complete overhaul

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126. *Id.* § 12131(2).

127. 28 C.F.R. § 35.130(b)(7) (2007).

128. *Id.*

129. *Id.* § 35.150(a)(3).

130. *Id.* It is currently unclear whether this exception applies to existing facilities as well as new facilities. The United States Supreme Court has not ruled on this issue. Some circuits have ruled on this issue. *See, e.g.*, Kinney v. Yersusalim, 9 F.3d 1067, 1075 (3d Cir. 1993) (holding the undue burden defense only applies to existing facilities).

131. Although the regulation is entitled "existing *facilities*," the regulation's introductory material implies it applies to existing *services* as well. *See* 28 C.F.R. § 35.150(a) ("A public entity shall operate each *service*, program, or activity so that the *service*, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.") (emphasis added).

132. *Id.* § 35.150(b)(1) (emphasis added).

of a program or service is not required.

D. Title II Jurisprudence—Reasonable Accommodation

Although the Supreme Court has not explicitly stated Title II imposes an affirmative duty on public entities to reasonably accommodate disabled individuals, such a duty has been implied in many cases.[133] For example, in *Tennessee v. Lane*, the Court recognized "that because 'failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to [program] accessibility.'"[134] The Court continued, "Title II's 'duty to accommodate' requires 'reasonable modifications that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.'"[135] Additionally, Justice Ginsberg explained, "Congress, the Court [has] observed, advanced in the ADA 'a more comprehensive view of the concept of discrimination,' one that embraced failures to provide 'reasonable accommodations.' The Court [in *Lane*] is similarly faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion.'"[136]

The holding in the landmark *Olmstead v. Zimring*[137] decision also supports an affirmative accommodation duty.[138] "The Court held that Title II of the ADA is meant to be consistent with § 504 of the Rehabilitation Act, which provides for reasonable accommodation unless 'the accommodation would impose an undue hardship on the operation of its program.'"[139] Finally, in *U.S. Airways v. Barnett*,[140] "the Court found the language in Title I to be nearly identical to the language in Title II."[141] The case involved Title I because it was an employment

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133. Lave & Zeff, *supra* note 115, at 448. ADA Title II issues have recently come before the Supreme Court. However, the most recent decisions have involved the ADA's relationship to the Fourteenth Amendment of the Constitution. For further inquiry on this topic, see *United States v. Georgia*, 546 U.S. 151, 157-60 (2006), a case holding state sovereignty could be waived in suits falling under Section 5 of the Fourteenth Amendment in Title II cases. "Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Id.* at 882. *See also* Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) ("[W]e concluded that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment.").

134. Lave & Zeff, *supra* note 115, at 448 (quoting *Lane*, 541 U.S. at 531). Note that the Court is merely reiterating 28 C.F.R. § 35.160(b)(7) (2007). *See Lane*, 541 U.S. at 531.

135. Lave & Zeff, *supra* note 115, at 448 (quoting *Lane*, 541 U.S. at 532).

136. *Id.* (quoting Olmstead v. Zimring, 527 U.S. 581, 598 (1999)).

137. 527 U.S. 581 (1999).

138. Lave & Zeff, *supra* note 115, at 448.

139. *Id.* (quoting *Olmstead*, 527 U.S. at 606 n.16).

140. 535 U.S. 391 (2002).

141. Lave & Zeff, *supra* note 115, at 449 (citing *U.S. Airways*, 535 U.S. at 397-98).

discrimination claim.[142] When the Court noted the language similarities and then ruled Title I provided an affirmative reasonable accommodation duty on public entities, it "implicitly acknowledged that Title II of the ADA contains a duty to reasonably accommodate the needs of the disabled."[143]

Appellate court decisions have affirmed this implicit duty and have outlined the duty's contents. In 2006, the Seventh Circuit tackled the issue of whether a city was required to modify its zoning rules in order to prevent discrimination against disabled individuals and, if such a requirement existed, the extent of the modification.[144] While this decision specifically tackled the issue of zoning, the court sought to clarify the Act's accommodation requirement, which affects all alleged Title II violations.[145] The court focused its analysis on the regulation's requirement of reasonable modifications *necessary* to prevent discrimination due to an individual's disability.[146] The court declared, "[U]nder our Title II case law, the 'on the basis of' language requires the plaintiff to show that, 'but for' his disability, he would have been able to access the services or benefits desired."[147] Additionally, the court found the "necessary" language contained in the regulation "makes clear that the duty to accommodate is an independent basis of liability under the ADA."[148] Further, the court outlined the core criteria for the establishment of an ADA Title II claim as requiring evidence that "'(1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionally impacts disabled people.'"[149]

In 2003, the Second Circuit also dealt with the issue of reasonable accommodation in the context of public benefits in *Henrietta v. Bloomberg*.[150] This case involved individuals living in New York City who had AIDS or HIV-

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142. *Id.*

143. *Id.*

> The Act requires preferences in the form of "*reasonable accommodations*" that are needed for those with disabilities to obtain the same . . . opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the [entity] to treat [individuals] with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an [entity's] disability-neutral rule cannot by itself place the accommodation beyond the Act's actual reach.

Id. (quoting *U.S. Airways*, 535 U.S. at 397-98) (emphasis added).

144. Wis. Cmty. Serv., Inc. v. City of Milwaukee, 465 F.3d 737, 746 (7th Cir. 2006).

145. *Id.*

146. *Id.* at 752 ("In short, each of these provisions requires the plaintiff to satisfy the 'necessary' element by showing that the reason for his deprivation is his disability.").

147. *Id.* The case was remanded back to the district court because it did not use a "but for" standard. *Id.* at 755. The district court was presented with the new question of whether the facility was prevented from locating to a new facility "*because of its clients' disabilities*." *Id.*

148. *Id.* at 753.

149. *Id.* (quoting Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840, 847 (7th Cir. 1999)).

150. 331 F.3d 261 (2d Cir. 2003).

related illnesses.[151] The plaintiffs brought suit against the City and State alleging these entities "fail[ed] to provide them with adequate access to public benefits."[152] The Second Circuit held:

> [A] claim of discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact. Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation.[153]

Thus, in order for a disabled individual to bring a claim for reasonable accommodation, it is only necessary that individual to demonstrate his or her disability prevents him or her from accessing a benefit that is available to persons with and without disabilities.[154]

Additionally, the court found the plaintiffs were able to demonstrate they were denied a public benefit because of their disabilities.[155] The court demonstrated this by first showing they were entitled to the benefits, which were also available to non-disabled individuals, and, second, by showing their disabilities would "clearly necessitate a reasonable accommodation in order for them meaningfully to access the benefits."[156] The court reasoned that the statute's use of the term "qualified" meant persons who are eligible for a program under the program's "formal legal eligibility requirements."[157] In discussing the plaintiffs' difficulty accessing the public benefits, the court referred to the district court's undisputed finding that "the plaintiffs are sharply limited in their ability to 'travel[], stand[] in line, attend[] scheduled appointments, complet[e] paper work, and otherwise negotitat[e] medical and social service bureaucracies."[158] The court also added, "Title II seeks principally to ensure that disabilities do not prevent access to public services where the disabilities can reasonably be accommodated."[159]

The Supreme Court had the opportunity to provide clarification to the term

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151. *Id.* at 264.

152. *Id.* The public benefit the plaintiff's alleged they could not adequately access was a program mandated by a city law that provided benefits and services to persons with AIDS or HIV-related illnesses. *Id.* at 264-67. The program, referred to as DASIS, "impose[d] procedural rules designed to facilitate access to existing federal, state, and local welfare benefits." *Id.* at 266.

153. *Id.* at 276-77 (rejecting appellant's claim that Title II of the ADA was not violated because the appellee's could not demonstrate disparate impact because some non-disabled persons were receiving similar treatment).

154. *Id.*

155. *Id.* at 280.

156. *Id.*

157. *Id.* at 277. The court also supported this assertion by citing the regulation's definition of "qualified individual with a disability." *Id.*

158. *Id.* at 278 (quoting Henrietta v. Giuliani, 119 F. Supp. 2d 181, 185 (E.D.N.Y. 2000)).

159. *Id.* at 279.

"fundamentally alter" when it issued its decision in *PGA Tour, Inc. v. Martin.*[160] While the case involved a professional golfer's claim under Title III of the ADA,[161] the Title II regulations contain the same exception for modifications that would "fundamentally alter the nature of [a] service, program, or activity."[162] In *PGA Tour*, the Court was confronted with the issue of whether or not the Professional Golf Association ("PGA") could prohibit a disabled professional golfer from using a golf cart because the PGA argued the nature of its tournaments would be "fundamentally altered."[163]

The Court ultimately held Martin's use of a golf cart would not "fundamentally alter" the nature of the PGA's tournaments.[164] Important to the Court's ruling was the finding that the rule prohibiting the use of a golf cart was a "peripheral" rule and not an indispensable rule.[165] Additionally, the Court remarked, "The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart."[166] The Court also pointed out the ADA requires the evaluation of a disabled person's needs on an *individual* basis.[167] Because Title II contains the same "fundamentally alter" language as Title III, the Court's definition of the phrase in *PGA Tour* should be applicable to Title II cases as well. An important distinction is made between proposed accommodations that would merely alter a "peripheral rule" and those that alter a rule found to be indispensable. Thus, a determination must be made as to what type of rule is affected by a proposed accommodation.

E. Title II Defenses

In contrast to Titles I and III, which contain explicit cost defenses, Title II does not contain such a defense.[168] "Despite the fact that the language of the statute, the regulations promulgated to enforce the integration requirement, and the legislative history all reject a cost defense, the Supreme Court interpreted ADA Title II to contain a cost defense to the integration requirement."[169] Colker,

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160. PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

161. Title III of the ADA concerns public accommodations. COLKER, *supra* note 112, at 3.

162. 28 C.F.R. § 35.130(b)(7) (2007).

163. *PGA Tour*, 532 U.S. at 665.

164. *Id.* at 690.

165. *Id.* ("A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament."). The Court remarked earlier in the decision, "[T]he walking rule is not an indispensable feature of tournament golf either." *Id.* at 686.

166. *Id.* at 690.

167. *Id.* at 687-88 ("[T]he ADA was enacted to eliminate discrimination against 'individuals' with disabilities . . . .").

168. COLKER, *supra* note 112, at 129.

169. *Id.* at 130-31 (quoting Olmstead v. Zimring, 527 U.S. 581, 606 (1999)). The *Zimring* decision is best known for opening up the treatment options for persons with mental disabilities. The Court held that "under Title II of the ADA, States are required to provide community-based

a leading disability discrimination scholar,[170] uses the example of the *Olmstead v. Zimring* case as an illustration, pointing out, "the Court said it would be all right for the state to have a 'waiting list that moved at a reasonable pace.'"[171] Colker further notes the Court failed to provide guidance regarding what would be considered a "reasonable pace."[172] The Court "effectively amended the statute to create a cost defense that had been rejected by Congress."[173]

It has been recognized that "[a]llowance of an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs."[174] Thus, the defense of undue burden is available when the modification involves an existing facility; however, Congress did not intend for the defense to be used in other circumstances.[175]

F. The Indiana BMV Policy Conflicts with Title II of the ADA

The Indiana BMV currently denies disabled individuals who are unable to physically visit a BMV branch access to its services. This denial of public services violates Title II of the ADA, which prohibits the denial of "the benefits of the services, programs, or activities of a public entity."[176] Congruent with the Seventh Circuit's criteria for a Title II claim, the BMV's rule "disproportionally impacts disabled people."[177] Disabled individuals with mobility problems or frail health are disproportionately impacted by the rule in that persons without such impairments are physically capable of visiting a BMV branch.

The Indiana BMV is a public entity as defined by Title II of the ADA due its status as a state government agency.[178] Because of its status as public entity, the BMV must comply with the statutory and regulatory requirements of the ADA.

Federal regulations require the Indiana BMV to reasonably accommodate

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treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the place can be *reasonably* accommodated . . . ." *Olmstead*, 527 U.S. at 607 (emphasis added).

170. Moritz College of Law—Faculty, Ruth Colker, http://moritzlaw.osu.edu/faculty/bios.php?ID=14 (last visited Nov. 13, 2007). Professor Colker is the Heck Faust Memorial Chair in Constitutional Law at The Ohio State University Moritz College of Law. *Id.*

171. COLKER, *supra* note 112, at 131 (quoting *Olmstead*, 527 U.S. at 606). Such reference to "reasonable pace" is reminiscent of the Court's "at all deliberate speed" language in the context of school desegregation. *Id.* (quoting Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955)).

172. *Id.*

173. *Id.*

174. Kinney v. Yerusalim, 9 F.3d 1067, 1074 (3d Cir. 1993) (involving the issue of a City's responsibility to install curb ramps during road reconstruction).

175. *Id.* at 1074-75 (citing H.R. REP. NO. 485, pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473)); *see also supra* notes 130-31 and accompanying text.

176. 42 U.S.C. § 12132 (2000).

177. Wis. Cmty. Serv., Inc. v. City of Milwaukee, 465 F.3d 737, 753 (7th Cir. 2006) (quoting Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840, 847 (7th Cir. 1999)).

178. *See supra* note 125 and accompanying text.

disabled individuals.[179] The Indiana BMV has failed to reasonably accommodate disabled individuals with significant mobility impairments or frail health due to its policy of requiring such individuals to physically visit a BMV facility in order to obtain a state-issued identification card. This denial of services could have devastating effects, resulting in the potential loss of critical health benefits due to the recent enactment of the Medicaid citizenship requirement.[180]

The Second Circuit held that a claim for reasonable accommodation could be made by demonstrating that disabled persons have more difficulty accessing a benefit available to both disabled and non-disabled individuals.[181] Similar to the program in *Henrietta*, the Indiana BMV's services are available to all persons, regardless of disability. Yet, because some disabled persons are completely barred from accessing these services due to severe disability, a claim for reasonable accommodation may be made.

Modifications to the BMV policy that would enable disabled individuals to access the BMV's services would not "fundamentally alter" the BMV's services because the policy is a peripheral rule. The Supreme Court explicitly excluded modification to "peripheral" rules as constituting fundamental alterations.[182] Similar to the golf cart exclusion in the *PGA Tour* case, the BMV's policy of requiring a visit to a BMV branch in order to obtain an identification card is a peripheral rule. It is not an "indispensable"[183] rule for the administration of this BMV service. There are other methods besides a visit to a BMV branch that would allow disabled individuals to obtain the necessary identification cards.[184] The Indiana BMV must enact policies and procedures to become compliant with the ADA, or it could risk potential litigation.

The BMV does not have the benefit of a cost defense argument. However, it is likely that if litigated, the BMV would attempt to argue a cost defense. Nonetheless, any requested alteration would not impose an undue burden on the BMV because it would not constitute a fundamental alteration and it would not involve extraordinary costs.

V. Policy Recommendations and Potential Solutions

Simply pointing out an "elephant in the room" does nothing to remove the elephant from the room. Similarly, one cannot simply point out the current deficiencies of the Indiana BMV without offering potential solutions to the problem. Clearly, Indiana must adopt a solution in order to avoid potential ADA Title II litigation and serve the needs of its disabled residents. Disabled residents are at risk of losing crucial Medicaid health benefits. Several options exist to remedy the current disconnect between the Medicaid citizenship requirement and

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179. 28 C.F.R. § 35.130(b)(7) (2007).

180. *See supra* Part II.

181. Henrietta v. Bloomberg, 331 F.3d 261, 276-77 (2d Cir. 2003).

182. *See supra* notes 164-65 and accompanying text.

183. *See supra* note 165 and accompanying text.

184. *See infra* Part V.

the Indiana BMV's policy, thus avoiding any potential litigation or deprivation of health benefits.

Most of the following proposed suggestions, however, involve policy changes at the federal level that would not simply apply to Indiana. Disabled individuals in other states likely face similar obstacles concerning this new citizenship requirement; thus, solutions at the federal level would address their needs and concerns as well. Addressing the issue at the federal level will help ensure better access and use of the Medicaid program. However, addressing the disconnect at the state level would provide disabled individuals with better access to identification cards, which will be increasingly important as such identification becomes a standard requirement on a wide range of fronts. Removing the barriers to obtaining identification cards at the state level will ensure that disabled individuals can not only access and use the Medicaid program, but that they can also access any other program or service requiring a state-issued identification card, such as voting.[185]

One proposal offered by the Center on Budget and Policy Priorities would be for Indiana and other states to exercise an option already included in the promulgated federal regulations.[186] "This option allows states to document individuals' citizenship and identity by conducting electronic cross-matches with existing databases, such as vital records, Social Security, and the state motor vehicles department. (At present, automated checks are feasible only for individuals born within the state.)"[187] This option would not exempt disabled persons from satisfying the Medicaid citizenship requirement; rather, it would allow the State to satisfy the requirement by simply tapping into databases already containing the necessary verification.

The Social Security database would most likely encompass the broadest number of affected individuals. Most United States citizens have a Social Security number; therefore, they are registered with the Social Security office, which would have information verifying such citizenship status in its database.[188] It is duplicative for a state to satisfy a federal Medicaid requirement by requiring applicants and recipients to produce documentation the federal government already possesses in one of its databases, such as the Social Security office records. Moreover, the federal government has already exempted three categories of individuals receiving governmentally administered benefits: SSI, SSDI, and Medicare recipients. Similarly, "traditional" Social Security

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185. *See supra* note 2 and accompanying text.

186. CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 54, at 3. This option could be exercised by any state and is not specific to Indiana. *Id.*

187. *Id.*

188. Social Security numbers are also issued by the Social Security office to non-citizens who have been lawfully admitted into the United States for purposes such as work or to obtain a benefit or service. SOCIAL SECURITY ADMINISTRATION, YOUR SOCIAL SECURITY NUMBER AND CARD 6-7 (2006), *available at* http://www.ssa.gov/pubs/10002.pdf. Even though Social Security numbers are issued to non-citizens, the Social Security office would have record of an individual's citizenship status.

beneficiaries'[189] citizenship status would also be on file with the federal government. It is illogical to exempt some Social Security beneficiaries, but not all Social Security beneficiaries, when all categories are required to be U.S. citizens.

Use of this database would enable state Medicaid programs to verify an individual's citizenship status; however, it would not be able to confirm the identity of the individual. There would be no verification that the individual providing a particular Social Security number is the person to whom the Social Security number attaches. Thus, the original problem remains: how to prove *identity*. In reality, while this proposal could help eliminate the amount of paperwork Medicaid applicants and recipients are required to produce, it does not solve the ultimate issue of how disabled individuals can prove identity when they are not able to access the government service that issues identity documents.

The federal government could alleviate this problem by exempting disabled individuals who are unable to physically access a state license branch from the identity documentation requirement, while still enforcing citizenship documentation. A hardship application process could be implemented to exempt the affected individuals. This application process could require verification by the individual's attending physician of his or her severe mobility impairment or frail health. Essentially, the physician would certify in writing that the applicant is virtually "homebound." A federal agency, the Social Security Administration, already uses a definition of "homebound" for Medicare recipients seeking to access home healthcare benefits covered by Medicare.[190] If the federal government finds the homebound criteria to be too lenient, stricter criteria could be adopted, such as deficiency in a certain number of "Activities of Daily Living."[191]

Another possible solution would be for the federal government to broaden the list of documents accepted to verify identity. The current list only contains seven possible sources of documentation, and many of the sources are only available to distinct categories of people.[192] The federal government identity documentation for registered voters is even less restrictive than this provision. The Help America Vote Act of 2002 ("HAVA") outlines requirements for voters

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189. "Traditional" Social Security beneficiaries are persons receiving Social Security retirement or survivor benefits. *See* INSTITUTE FOR WOMEN'S POLICY RESEARCH, WHO ARE SOCIAL SECURITY BENEFICIARIES? 1 (2005), http://womenandsocialsecurity.org/Women_Social_Security/pdf/D461.pdf.

190. CENTERS FOR MEDICARE AND MEDICAID SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICARE AND HOME HEALTH CARE 11 (2004), *available at* http://www.medicare.gov/Publications/Pubs/pdf/10969.pdf. "To be homebound means that leaving home takes considerable and taxing effort." *Id.*

191. "Activities of Daily Living" include personal care tasks such as bathing, dressing, feeding and toileting. National Center for Health Statistics—Data Definitions, http://www.cdc.gov/nchs/datawh/nchsdefs/ADL.htm (last visited Nov. 13, 2007).

192. *See supra* note 75 and accompanying text.

who register by mail.[193] If an individual has registered to vote by mail and has not previously voted in a federal election, the individual is required to present photo identification when he or she votes in person.[194] However, HAVA provides that identity documents other than photo identification are acceptable, such as "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."[195]

If the federal government is willing to accept these alternative documents for voting, it should be willing to accept them for Medicaid identity purposes. It is important to reiterate that this one identity document would not be the only piece of identification presented by Medicaid applicants and recipients. Proof of citizenship remains a requirement. Such proof is also a form of identification when coupled with the identity documentation. However, there is a possibility this proposed solution would not be adopted. With the exception of a school identification card, all of the accepted forms of identity documentation outlined under the Medicaid Citizenship Requirement are government-issued, either by states or the federal government. It is likely the federal government chose these forms of identification because these are the only forms it trusts. Further, Congress is already considering toughening the identity requirements under HAVA.[196]

Absent a federal remedy for this issue, there are also solutions Indiana could adopt to ensure disabled individuals are not disproportionately affected by the Medicaid Citizenship Requirement. One solution is for Indiana to allow these individuals to obtain photo-exempt identification cards. The federal regulation does not require a state-issued identification card to include a photograph if it contains "other identifying information such as name, age, sex, race, height, weight, or eye color."[197] Indiana already allows certain categories of individuals to obtain photo-exempt state-issued identification cards, and a form already exists to apply for this special card.[198] Disabled individuals could mail in the applications, alleviating the need to physically visit a BMV facility. This solution is likely the most feasible and cost-effective option for the BMV to reasonably accommodate disabled individuals. Additionally, this accommodation would likely survive any undue burden challenge. It would not involve the creation of a new policy or form, no additional staff would be necessary to implement it, and it could be implemented immediately upon adoption.

If the Indiana BMV rejected the proposal to include disabled individuals among the groups of people allowed to obtain photo-exempt state-issued

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193. 42 U.S.C. § 15483(b) (Supp. 2004).

194. *Id.* § 15483(b).

195. *Id.* § 15483(b)(2)(A)(i)(II).

196. Verifying the Outcome of Tomorrow's Elections Act of 2007, H.R. 879, 110th Cong. (2007) (as referred to the Committee on House Administration, Feb. 7, 2007).

197. 42 C.F.R. § 435.407(e)(1)(i) (2007).

198. *See supra* notes 102-04 and accompanying text.

identification cards, another way the agency could avoid ADA Title II non-compliance exists. The agency could appoint staff to conduct outreach to disabled persons who are unable to physically access the BMV facilities. These individuals would visit homes, long-term care facilities, and other applicable venues to review documentation required to obtain the state-issued identification card. Once the documentation was reviewed and the designated staff person determined an individual was eligible for the identification card, a photograph could be taken at that time by a digital camera device. This image could then be transferred to the BMV's computer database upon the staff person's return to the BMV branch, and an official identification card could be printed. The card could then be held at the branch for an authorized person (such as a caregiver) to pick up, or it could be mailed to the individual via certified mail. The person authorized to pick up the card or sign for the card, if the individual is unable to do so, could be appointed during the face-to-face visit with the BMV staff person.

This potential solution would likely provoke an undue burden argument by the BMV and thus is the least desirable solution to the problem. The BMV would likely argue that such an accommodation is too much of a financial burden. It would likely increase the staffing costs of the BMV as there would need to be staff available to conduct these off-site visits. Such a service would also be less efficient for the BMV than its current branch service where many individuals can be assisted under one roof and staff are contained within a single building. The driving time between visits would decrease the number of individuals that could be served each day compared to the BMV branch sites. Additionally, the number of disabled individuals needing this service could be concentrated more heavily in some areas of the state than others. Without data and projections of the number of individuals requiring this service, it could be very difficult for the BMV to plan ahead.

This argument can be rebutted by pointing out that many of the affected individuals likely reside in residential facilities, such as nursing facilities. Therefore, the BMV could serve several individuals at a time when it visits a facility. The BMV could design a schedule whereby it visits such facilities on a regular basis, such as bi-monthly. The facilities would then know ahead of time when the BMV was scheduled to visit particular sites, allowing them to plan accordingly with their residents. The cost resulting from this service would be minimized by maximizing the efficiency of the operation. Additionally, by having a designated team of people who administer this special program, the BMV can plan staffing needs. Furthermore, the federal regulation specifically highlights home visits as a possible modification option for public entities.[199]

In short, if the federal requirements are not eased, Indiana will have no choice but to adopt a policy that accommodates disabled individuals, allowing them to access the crucial services of the BMV.

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199. *See supra* note 132 and accompanying text.

Conclusion

When confronted with the collision of what seem to be such inflexible policies, it is easy to throw one's hands up and give up, believing there is no possible solution. However, while there are significant problems and contradictions between the two policies, an efficient and cost-effective solution is possible. Such a solution often requires creativity and an open mind. It often appears policies are created in a vacuum and that little consideration is given to how the policies might affect one another. It is possible to give meaning and effect to both policies, but compromise is required.

Photo identification requirements are likely only going to continue to increase as concerns regarding illegal immigration and fraud remain on the forefront of political debate. Therefore, it is essential that all eligible persons are able to obtain such identification so that they can fully participate as citizens of the United States. Many of the issues identified with respect to the new Medicaid citizenship requirement are applicable for any program or service requiring photo identification. The law need not be a barrier for at-risk and vulnerable populations to obtain this identification; rather, it can be a tool for advocacy and the development of creative solutions as has been demonstrated in this Note.

EMPLOYERS BEWARE: *BURLINGTON NORTHERN V. WHITE* AND THE NEW TITLE VII ANTI-RETALIATION STANDARD

CHRISTOPHER J. ECKHART*

INTRODUCTION

In 2006, anti-retaliation claims constituted nearly twenty-six percent of the overall claims brought under Title VII.[1] That percentage will likely increase after the United States Supreme Court's decision in *Burlington Northern & Santa Fe Railway Company v. White*.[2] In *Burlington*, the Court settled a circuit split with regard to employment discrimination.[3] Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of "race, color, religion, sex, or national origin."[4] The Act's anti-retaliation provision forbids an employer to "discriminate against" an employee "because he has made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.[5] The circuit split revolved around the issue of which employer actions "discriminate against" an employee under 42 U.S.C. § 2000e-3(a), the anti-retaliation provision.[6] Up to that point, the circuits had formed three different approaches to defining what actions "discriminate against" employees who have engaged in a protected activity under Title VII. Some circuits applied a strict view of what actions "discriminate against" employees by limiting the anti-retaliation provision to actions involving "ultimate employment decision[s]."[7] Other circuits, under a moderate view, required actions affecting the privileges, terms, and conditions of employment.[8] The remaining circuits, under the liberal view, only required actions that would be material to a reasonable employee.[9]

In *Burlington*, the Court made it easier for employees to make a Title VII employment discrimination claim for retaliation by holding that "discriminate against" is not limited to ultimate employment decisions, i.e., firing or refusing

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1. *See* EEOC, Charge Statistics FY 1997 Through FY 2006, www.eeoc.gov/stats/charges.html (last visited on Feb. 5, 2007).

2. 126 S. Ct. 2405 (2006).

3. *Id.*

4. 42 U.S.C. § 2000e-2(a) (2000).

5. *Id.* § 2000e-3(a).

6. *See* Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Mattern v. Eastman Kodak Co., 104 F.3d. 702, 707 (5th Cir. 1997); *see also* Irene Gamer, Comment, *The Retaliatory Harassment Claim: Expanding Employer Liability in Title VII Lawsuits*, 3 SETON HALL CIRCUIT REV. 269, 287-91 (2006) (explaining the three different approaches amongst the circuits in defining "discriminate against.").

7. *See* Gamer, *supra* note 6, at 287-89 (citing Manning v. Metro. Life Ins., 127 F.3d 686, 692 (8th Cir. 1997)).

8. *Id.* at 290-91 (citing Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999)).

9. *Id.* at 289-90.

to hire someone.[10] Rather, the Court held that in order to fall under the "discriminate against" language, an employer's actions need only be "materially adverse" to a reasonable employee or applicant.[11]

This decision, of course, did not bode well with employers. Employers complained about the difficulty in predicting future liability, citing the lack of clarity in the Court's explanation of what actions "discriminate against" employees.[12] Employers were not alone. Justice Alito filed a concurring opinion, questioning the clarity of the majority's standard and the difficulty in applying that standard.[13] The expansiveness of the *Burlington* decision, and the increase in costs of litigation to employers resulting from the decision, remain to be seen. One thing is clear: employers need to take action to prevent retaliation by supervisors against employees that have engaged in a protected activity. Avoiding liability will certainly be more difficult under this new standard as compared to claims under the main anti-retaliation provision. The first step to avoiding liability is implementing effective human resource policies to deter retaliation and effective grievance procedures to address existing retaliatory conduct.

Part I of this Note briefly discusses the elements of a Title VII anti-retaliation claim. Part II discusses the circuit split before the *Burlington* decision. Part III discusses the *Burlington* decision and how the Court resolved the circuit split. Part IV analyzes the potential problems with the standard articulated by the Court, drawing not only from Justice Alito's concerns, but also from concerns of employers. Finally, Part V argues that courts should allow employers to assert affirmative defenses to defend against the increased amount of retaliation claims. Part V also discusses possible human resource solutions to prevent employer liability.

I. Elements of a Retaliation Claim under Title VII

Under Title VII:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin . . . .[14]

Congress enacted this provision to protect employees from discrimination by

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10. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006).

11. *Id.* at 2415.

12. Russell Adler, *Employers, Beware: Supreme Court Decision Changes the Playing Field*, Legal Intelligencer 5, Aug. 29, 2006, at 5 (discussing the potential expansiveness of the *Burlington* standard).

13. *Burlington*, 126 S. Ct. at 2421 (Alito, J., concurring).

14. 42 U.S.C. § 2000e-2(a) (2000).

their employers on the basis of sex, religion, race, or national origin.[15] Congress included the anti-retaliation provision because it recognized a need to protect employees from employer retaliation in order for Title VII to be effective.[16] Under the anti-retaliation provision, "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[17]

Retaliation claims under Title VII include a "'three-step burden-shifting analysis.'"[18] In the first step, the employee must demonstrate a "prima facie case of retaliation."[19] An employee must prove three elements to establish a prima facie case of retaliation: "'(1) participation in a protected activity that is known to the defendant, (2) an employment decision or action disadvantaging the plaintiff, and (3) a causal connection between the protected activity and the adverse decision.'"[20] After the employee demonstrates a prima facie case of retaliation, "'[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'"[21] According to the Supreme Court, employers can disprove a prima facie case of retaliation by providing a "'reasonable basis' for the employer's action against the . . . employee."[22] If the employer makes such a showing, the employee can invoke the third step in order to receive a remedy against the employer.[23] In the third step, the employee must show that the "reasonable basis" for the employer's actions "was merely a pretext to discriminate against the employee."[24] The Court in *McDonnell Douglas* noted that pretext could be proven by demonstrating "disparate treatment of minorities, mistreatment of the employee during the employment period, or a negative employer response to the plaintiff/employee's civil rights activities."[25]

Ultimately, "[t]he key to making a successful retaliation claim is that the [employee] must prove the employer took some adverse employment action

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15. *See* Christopher M. Courts, Note, *An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235, 237 (2001) (explaining the purpose of Title VII's discrimination provisions).

16. *Id.* at 237-38.

17. 42 U.S.C. § 2000e-3(a) (2000).

18. *See* Courts, *supra* note 15, at 240 (quoting Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998)).

19. *Id.* (citing *Quinn*, 159 F.3d at 768).

20. *Id.* (quoting Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 443 (2d Cir. 1999)).

21. *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

22. *Id.* (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802).

23. *Id.*

24. *Id.* (citing *Richardson*, 180 F.3d at 443 ("If the defendant meets its burden, the plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation.")).

25. *Id.* (citing *McDonnell Douglas Corp.*, 411 U.S. at 805).

against them."[26] Defining adverse employment action was, of course, at the heart of the *Burlington* decision.

II. The Circuit Split in Defining Which Employment Actions "Discriminate Against" Employees

Before Burlington, the circuits took three different approaches with regard to defining "discriminate against" under the statutory provision: (1) a strict view, (2) a moderate view, and (3) a liberal view.[27] These views spanned from those actions involving ultimate employment decisions, such as hiring or firing, to actions materially adverse to a reasonable employee.[28]

A. The Strict-View Approach to Defining "Discriminate Against"

Under the strict-view approach, followed by the Fifth and Eighth Circuits, "discriminate against" required "an adverse employment action consist[ing] of an ultimate employment decision that produces a 'tangible change in duties or working conditions' and results in a 'material employment disadvantage.'"[29] These circuits required the employee to show an "'[u]ltimate employment decision[],'" limiting actionable conduct to "'hiring, granting leave, discharging, promoting,'" demoting, granting or denying compensation, or reassignment.[30] Under the strict-view approach, "lateral transfer[s], poor treatment by supervisors or co-workers, . . . verbal reprimand[s], and a missed pay raise" did not constitute actionable conduct under the anti-retaliation provision.[31]

B. The Moderate-View Approach to Defining "Discriminate Against"

Under the moderate-view approach, followed by the Second, Third, Fourth, and Sixth Circuits, "discriminate against" required "an ultimate employment decision or a decision materially affecting employment privileges, conditions, terms or compensation."[32] These circuits "insisted upon a close relationship between the retaliatory action and employment."[33] This standard is the same standard applied to a substantive discrimination offense under Title VII, mandating that the challenged action have an effect on the terms, conditions, or

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26. *Id.*

27. *See* Gamer, *supra* note 6, at 287-91.

28. *See id.*

29. *Id.* at 287 (quoting Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997)).

30. Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (quoting Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995)); *see Manning*, 127 F.3d at 692; *see also* Gamer, *supra* note 6, at 287-88.

31. *See* Gamer, *supra* note 6, at 287 (footnotes omitted).

32. *Id.* at 290 (citing Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999)).

33. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410 (2006).

benefits of employment.[34] Examples of actionable conduct included, but were not limited to, "a reduction in job responsibilities or professional status, a poor performance review, [or] a denial of salary and benefits."[35]

C. The Liberal-View Approach to Defining "Discriminate Against"

Other circuits imposed a minor limitation on the scope of the entire retaliation provision by reading the provision broadly.[36] The Seventh and the District of Columbia Circuits only required a showing that the employer's challenged action "would have been material to a reasonable employee," likely "dissuad[ing] a reasonable worker from making or supporting a charge of discrimination."[37] The Ninth Circuit required a showing of "'adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'"[38] Examples of actionable conduct "under this approach include bad references, poor performance evaluations, negative remarks about an employee[,] . . . transferring an employee to a lateral position, cutting off challenging assignments, relocating the employee from a nice office to a dingy closet and changing the work schedule."[39]

III. THE *BURLINGTON* DECISION: THE COURT ADOPTS THE BROAD VIEW

In *Burlington*, the Court attempted to clear the confusion as to what standard to apply in Title VII anti-retaliation cases.[40] The circuit split contained three different approaches to defining which employment actions "discriminate against" an employer under Title VII's anti-retaliation provision.[41] The facts underlying *Burlington* provided an excellent opportunity to witness the practical differences in the three different views of the circuits.

A. The Facts

The case involved Sheila White, a railroad worker and the only woman working in her department at Burlington's Tennessee yard.[42] In June 1997, White was approached by Burlington's roadmaster, Marvin Brown, about her

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34. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 795 (3d Cir. 2004).

35. *See* Gamer, *supra* note 6, at 290.

36. *See* Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006); Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

37. *Washington*, 420 F.3d at 662; *see Rochon*, 438 F.3d at 1217-18.

38. *Ray*, 217 F.3d at 1242-43 (quoting EEOC Compliance Manual § 8, Retaliation, ¶ 8008 (1998)).

39. *See* Gamer, *supra* note 6, at 289-90.

40. Burlington N. & Sante Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).

41. 42 U.S.C. § 2000e-3(a) (2000).

42. *Burlington*, 126 S. Ct. at 2409.

interest in operating forklifts.[43] Burlington had hired her as a track laborer.[44] A co-worker who had operated the forklift assumed other responsibilities, so Brown promoted White to forklift duty.[45] Although White continued to perform some track laborer duties, "operating the forklift was [her] primary responsibility."[46]

"In September 1987, White complained to Burlington officials that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in the Maintenance of Way department."[47] According to White, Joiner "had also made insulting and inappropriate remarks . . . in front of her male colleagues."[48] An internal investigation resulted in the suspension of Joiner for ten days.[49] On September 26, Brown removed White from forklift duty and reassigned her to her former tasks as track laborer.[50] He stated "that the reassignment reflected co-workers' complaints that 'a more senior man' should have the 'less arduous and cleaner job' of forklift operator."[51] On October 10, White filed a complaint with the Equal Employment Opportunity Commission ("EEOC") "claim[ing] that the reassignment of her duties amounted to unlawful gender-based discrimination [in] retaliation for . . . having earlier complained about Joiner."[52] White later filed another charge alleging "Brown had placed her under surveillance and was monitoring her daily activities."[53] The charges were mailed to Brown on December 8.[54]

A few days later, White and her immediate supervisor disagreed about the type of transportation White should take from one location to another.[55] Later that day, White's supervisor told Brown that White had been "insubordinate," and White was suspended without pay.[56] White followed company grievance procedures, which led Burlington officials to conclude that she had not been insubordinate.[57] Burlington reinstated White, offering thirty-seven days worth of back pay for the time she had been suspended.[58] She then filed yet another charge with the EEOC because she was suspended.[59]

White filed an action in federal court against Burlington under Title VII

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* (citing White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 792 (3d Cir. 2004)).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

claiming that Burlington's actions—specifically, "changing her job responsibilities[] and . . . suspending her for [thirty-seven] days without pay"—constituted unlawful retaliation.[60] The jury found in her favor on both claims and awarded her $43,500 in compensatory damages.[61] The Sixth Circuit reversed.[62] However, the Sixth Circuit sitting en banc affirmed the district court's judgment on both retaliation claims.[63] The members of the Sixth Circuit nonetheless disagreed "as to the proper standard to apply."[64]

B. The Court's Answer to the Circuit Split and White's Claim

The fundamental issues the Supreme Court needed to address were: in a Title VII retaliation action, "whether the challenged action has to be employment or workplace related and . . . how harmful that action must be to constitute retaliation."[65] The Court reviewed and analyzed each of the circuits' different interpretations of the anti-retaliation provision.[66] The Court concluded that the anti-retaliation provision reads differently than the substantive provision.[67] The Court noted the difference in language between the anti-retaliation provision and the general discrimination provision, namely that in the anti-retaliation provision the term "discrimination" does not have the qualifiers that the same term has in the substantive provision.[68] The Court also looked at congressional intent,[69] even though legislative history of Title VII is relatively scarce.[70] The Court noted that the anti-retaliation and substantive provisions have different purposes. "The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status."[71] However, "[t]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic

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60. *Id.* at 2410.

61. *Id.*

62. White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443 (6th Cir. 2002).

63. *Burlington*, 126 S. Ct. at 1210.

64. *Id.*

65. *Id.*

66. *See id.* at 2410-11.

67. *Id.* at 2414.

68. *Id.* at 2411-12. The Court was referring to the following language in the main discrimination provision of Title VII: "or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment*[.]" 42 U.S.C. § 2000e-(2)(a) (2000) (emphasis added). This language does not appear in the anti-retaliation provision. *See* 42 U.S.C. § 2000e-(3)(a) (2000).

69. *See Burlington*, 126 S. Ct. at 2411-12.

70. *See* Eric M.D. Zion, Note, *Overcoming Adversity: Distinguishing Retaliation from General Prohibitions Under Federal Employment Discrimination Law*, 76 IND. L.J. 191, 195-98 (2001).

71. *Burlington*, 126 S. Ct. at 2412 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973)).

guarantees."[72] The substantive provision prevents injury based on who employees are, while the anti-retaliation provision prevents harm based on what the employees do.[73]

The Court further noted that, in order "[t]o secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination."[74] However, the second objective cannot be secured "by focusing only upon employer actions and harm that concern employment and the workplace."[75] This is so because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."[76] Ultimately, the language and purpose of the Act supported the conclusion "that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[77]

The Solicitor General argued that it is odd to read the anti-retaliation provision broader than the discrimination provision, in effect providing "broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination."[78] In response, citing the National Labor Relations Act,[79] the Court noted that "Congress has provided similar kinds of protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions."[80] Finally, the Court reasoned that Title VII depends on employees who are willing to stand up to employers and file complaints, and that a broad interpretation of the anti-retaliation provision, which in turn gives more protection to these employees, would encourage such behavior.[81]

Ultimately, the Court held that the entire "retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace."[82] The Court then concluded, following the reasoning of the Seventh and District of Columbia Circuits,[83] that the anti-retaliation "provision covers those . . . employer actions that would have been materially adverse to a reasonable employee or job applicant. . . . [T]hat means that the employer's actions must be harmful to the point that they could well dissuade a

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (citing Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2006); Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

77. *Id.* at 2412-13 (citing Wachovia Bank v. Schmidt, 546 U.S. 303, 319 (2006)).

78. *Id.* at 2414.

79. *See* 29 U.S.C. §§ 158(a)(3)-(4) (2000).

80. *Burlington*, 126 S. Ct. at 2414.

81. *Id.*

82. *Id.* at 2409.

83. *Id.* at 2410-11.

reasonable worker from making or supporting a charge of discrimination."[84] The Court reasoned that the materiality aspect of its holding "served to separate significant from trivial harms."[85] "The anti-retaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms . . . by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers."[86]

The Court implemented the "reasonable employee" element because it "believe[d] that the provision's standard for judging harm must be objective."[87] The objective standard, according to the Court, is "judicially administrable."[88] The standard is phrased "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances."[89] According to the Court, "[c]ontext matters," and an objective standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[90] However, the Court, apparently trying to alleviate some of the concerns raised in Justice Alito's concurring opinion, stated that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."[91] The Court stated that "normally petty slights, minor annoyances, and simple lack of good manners will not" be sufficient to deter an employee pursuing his or her rights under Title VII.[92]

Applying the standard, the Court held that the evidence supported the jury's verdict against Burlington Northern.[93] A reassignment of duties can constitute retaliatory discrimination even where "both the former and present duties fall within the same job description."[94] The record contained evidence that the track labor duties were less desirable than the forklift operator duties, that the forklift operator position was indicative of prestige, and that employees consistently viewed the forklift operator position as a better job.[95] The Court concluded that "a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee."[96] As for the thirty-

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84. *Id.* at 2409.

85. *Id.* at 2415.

86. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (citing 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996)).

92. *Id.*

93. *Id.* at 2416.

94. *Id.*

95. *Id.* at 2417.

96. *Id.*

seven days without pay (that was re-paid), the Court concluded that "[m]any reasonable employees would find a month without a paycheck to be a serious hardship."[97]

IV. Arguments over the Clarity of the *Burlington* Standard

The Court's decision in *Burlington* raised the eyebrows of not only employers, but also of Justice Alito as demonstrated by his concurring opinion. While ultimately having different worries underlying their concerns, those raising issues with the Court's decision share one theme: the Court's standard for actionable retaliatory conduct is unclear and therefore unpredictable.

A. Justice Alito: The Majority's Standard is Unclear

One central theme in Justice Alito's concurring opinion was the uncertain application of the majority's standard that will undoubtedly occur. He specifically raised three potential problems with the application of the Court's holding in *Burlington*.[98] First, he believed that the new standard would lead to "topsy-turvy results [that] make no sense."[99] Specifically, he believed that employers, under this new standard, will have incentive to subject their employees to the most severe discrimination while not incurring liability under the anti-retaliation provision.[100] However, Justice Alito opined that employees will be more dissuaded from even filing a claim where the discrimination is of "a much milder form," and therefore, the employer again will not be liable under the anti-retaliation provision.[101]

Justice Alito's second concern was that "the majority's conception of a reasonable worker is unclear."[102] Even though the majority stated that the "reasonable worker" test is objective, "it later suggests that at least some individual characteristics of the actual retaliation victim must be taken into account."[103] He noted the majority's view that "the significance of any given act of retaliation will often depend upon the particular circumstances."[104] According to Justice Alito, "the majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim."[105] He feared that future jurors and courts may take too many individual characteristics into account when deciding if the adverse actions would have

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97. *Id.*
98. *Id.* at 2420-21 (Alito, J., concurring).
99. *Id.* at 2421.
100. *See id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* (quoting majority opinion at 2415).
105. *Id.*

dissuaded a "reasonable person."[106] Finally, Justice Alito opined that the Court inserted a new test for causation into "an area of the law in which standards of causation are already complex" and that such an insertion is unwelcome.[107]

B. Complaints from the Business World: Employers Fear the Unknown

Many people in the business world, attaching to Justice Alito's concerns for the lack of clarity in the Court's standard, have also raised concerns. Simply stated, employers believe the Court's decision in *Burlington* will lead to increased costs stemming from litigation and prevention of litigation through Human Resource ("HR") tactics.[108] According to some, the *Burlington* decision forces employers to implement more intensive HR strategies to avoid retaliation claims.[109] Implementing these policies and strategies costs employers time and money. Within a few weeks of the decision, legal analysts began instructing companies to implement new HR strategies.[110] These analysts primarily focused on proper training and documentation.[111]

Most argue that the new standard will lead to more lawsuits that are not only expensive, but also very time consuming for federal courts. Employers and employer advocates saw the "ultimate employment decision" standard as a sorting principle imperative to the efficient resolution of Title VII retaliation claims.[112] "The requirement that an employee have at least suffered some tangible harm before resorting to court action provides an important sorting principle in discrimination cases. This allows for trivial claims to be dismissed summarily, reserving the courts' and juries' time and attention for more seriously

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106. *Id.*

107. *Id.*

108. *See, e.g.*, Adler, *supra* note 12.

109. *See* Jonathan D. Wetchler, *Employers Should Do Retaliation! What the Supreme Court Said in* Burlington Northern v. White, *and What Employers Should Do About It*, METRO. CORP. COUNS., Aug. 2006, at 16.

110. *See id.*; *see also* Adler, *supra* note 12 ("As a result [of the *Burlington* decision], employers should proceed with even greater caution to ensure that routine adjustments to employee tasks and other common workplace occurrences do not result in retaliation claims, especially since these standards are likely to be applied to additional statutes and result in increased retaliation claims under other federal and state anti-discrimination laws as well."); Jathan Janove, *Retaliation Nation: A Recent U.S. Supreme Court Ruling with Stir up a New Wave of Retaliation Claims*, HRMAG., Oct. 1, 2006, at G2 (stating "HR professionals will need to take a renewed, and perhaps different, role in establishing policy and in training managers to be better practitioners of good HR" as a result of *Burlington*); Michael P. Maslanka, *Post*-Burlington Northern *Employment Procedures*, TEX. LAW., Sept. 4, 2006, at S51 (listing steps for employer's to take to avoid retaliation claims as well as questions to consider after a claim alleging discrimination has been filed).

111. Wetchler, *supra* note 109.

112. John Myers, *Supreme Headache for Employers? High Court Ruling Could Clear Way for More Employee Discrimination Suits*, PITT. POST-GAZETTE, July 18, 2006, at A14.

harmed claimants."[113] The decision in *Burlington*, although "theoretically sound," is "impractical . . . [because] there is no sorting principle that will allow pre-trial dismissal of trivial claims filed by the scarcely harmed."[114]

Employers argue that the *Burlington* standard will make it difficult if not impossible to successfully defend against non-tangible employment action at the summary judgment stage.[115] The standard focuses on those actions that would deter a reasonable employee, instead of a concrete, bright line rule requiring ultimate employment decisions or actions affecting the terms and conditions of employment.[116] Under the latter standards, district courts could easily determine whether a genuine issue of material fact existed as required under Federal Rule of Civil Procedure 56.[117] If the employee was fired, or if the employee's terms and conditions of employment were changed, the employer could not win on a summary judgment motion. "The court's decision to assess 'context' will result in more cases being filed and fewer of them being resolved on summary judgment."[118]

"[T]he number of retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) has jumped [thirty-five] percent over the past decade."[119] Employment discrimination cases now make up ten percent of the federal docket.[120] "[I]n fiscal year 2004 alone, retaliation charges resolved by the EEOC resulted in monetary payments from employers that exceeded $90 million. This figure does not include employer judgment and settlement payments through litigation."[121] Further, according to the EEOC, "punitive damages often will be appropriate in retaliation claims brought under [Title VII]."[122] It follows that future liability under Title VII's anti-retaliation provision could be drastic.

Moreover, according to at least one commentator, *Burlington*'s expansion as to what constitutes retaliation will actually encourage employees to assert claims of discrimination that lack merit to gain the protections of the anti-retaliation provision.[123] He also notes that the reasoning in *Burlington* will likely be applied to other anti-retaliation laws, which will in turn lead to even more litigation for companies.[124]

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113. *Id.*

114. *Id.*

115. *Id.*

116. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006).

117. *See* FED. R. CIV. P. 56(c).

118. Janove, *supra* note 110.

119. *Id.*

120. E.J. Graff, *Striking Back the Supreme Court Recently Handed Workers a 9-0 Victory in a Pivotal Workplace Discrimination Case. But Will the Lower Courts Turn Victory Into Defeat?*, BOSTON GLOBE, Sept. 3, 2006, at D1.

121. Janove, *supra* note 110.

122. EEOC COMPLIANCE MANUAL (1998), *available at* http://www.eeoc.gov/policy/docs/retal.html.

123. *See* Janove, *supra* note 110.

124. *Id.*

Aside from the mere increase in litigation, many believe that the lower courts will struggle with the reasonable employee standard, as stated in Justice Alito's concurring opinion.[125] "The Supreme Court may have somewhat confused matters when it called for a [sic] objective standard for judging the harm created by the allegedly retaliatory conduct."[126] Although the Court ultimately wants to decrease litigation by encouraging employers to handle retaliation claims in house, "'the standard [the Court] selected is so unclear that the employer . . . will have a very difficult time deciding when it's at risk and when it's not.'"[127] Therefore, the Court's desire to have retaliation claims dealt with by employers may not be plausible.

C. An Argument that the Burlington *Standard Is Unclear as Applied to Hostile Work Environment Claims*

In her comment, Irene Gamer analyzes the uncertainty regarding the application of the *Burlington* standard as it applies to hostile work environment ("HWE") claims and retaliatory harassment.[128] Gamer, acknowledging that the Court in *Burlington* "did not specifically mention retaliatory harassment," states that *Burlington*'s broad definition of adverse employment actions falling under the "discriminate against" language of Title VII encompasses a claim of retaliatory harassment.[129] She concludes that "employers remain unguided on their liability for retaliatory harassment" because the Court in *Burlington* did not address whether hostile work environment harassment standards under 42 U.S.C. § 2000e-2(a), the main discrimination provision, apply to retaliation claims.[130]

Gamer made a number of specific complaints about the broad standard laid out in *Burlington* if HWE law is applied to retaliatory harassment claims. First, she argues that the affirmative defense options set out in *Burlington Industries, Inc. v. Ellerth*[131] and *Faragher v. City of Boca Raton*[132] are not practical. "*Ellerth* and *Faragher* require[] employers to exercise 'reasonable care to prevent and correct' harassment."[133] However, as Gamer states, with the uncertainty after *Burlington* as to what actions constitute actionable conduct under the anti-retaliation provision, employers will not be able to know what steps need to be taken to exercise such reasonable care to prevent and correct harassment.[134] Gamer argues that, if the unclear standards of HWE claims under the anti-

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125. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2421 (2006) (Alito, J., concurring).

126. Adler, *supra* note 12.

127. Graff, *supra* note 120 (statement of Hunter R. Hughes, III).

128. *See* Gamer, *supra* note 6.

129. *Id.* at 295.

130. *Id.*

131. 524 U.S. 742 (1998).

132. 524 U.S. 775 (1998).

133. Gamer, *supra* note 6, at 295 (quoting *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807).

134. *Id.* at 296.

discrimination provision apply to anti-retaliation litigation, it will be "virtually impossible for employers to prevent liability."[135] As to the ambiguity of the *Burlington* standard, Gamer states:

> [A]n employer is left wondering whether an employee is protected for reporting conduct that is perfectly lawful; whether it can punish a disloyal employee who disrupts its business while claiming to oppose unlawful action; and whether it can have retaliatory animus imputed to it simply because it takes an adverse employment action against an employee "shortly" after she engages in protected activity.[136]

Essentially, employers are left in the dark as to how to prevent liability for workplace retaliation. Gamer explains how employers must make extended efforts to avoid litigation. First, employers should accept as protected conduct any participation in opposition activity just to be safe.[137] An employer must do this even if the conduct is lawful and even if the employee's behavior is disruptive.[138] After such conduct is noticed, "the retaliatory harassment cause of action forces the employer to monitor and regulate any subsequent offensive treatment that [the] employee encounters."[139] Gamer states that under the main discrimination provision, potentially actionable conduct is somewhat easy to spot.[140] However, under the anti-retaliation standard, Gamer argues that employers will be liable for conduct that may not involve a "retaliatory theme."[141] Examples include transferring an employee from a "'brightly lit office to a dingy closet,'" giving an employee "a bad reference or performance review," or denying an employee a raise.[142] She states that courts routinely rely on inferences in holding that an adverse employment action is motivated by retaliation.[143] According to Gamer, the *Burlington* standard as applied to retaliatory harassment will have a negative effect on blue-collar employers specifically.[144]

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135. *Id.* at 295-96 ("By applying HWE law to retaliatory harassment claims, courts combine the circuit splits from both provisions into one cause of action, making it more difficult than ever for an employer to assess and prevent Title VII liability. Such decisions leave the employer confused about how to spot protected conduct and what kind of supervisor or employee responses to the protected conduct it must regulate.").

136. *Id.* at 296.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 296-97 ("For example, sex-based HWE harassment may involve unwelcome remarks about a plaintiff's anatomy, sexually explicit jokes and photographs, or sexist comments.").

141. *Id.*

142. *Id.* (quoting Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996)).

143. *Id.* at 297.

144. *Id.* at 297-98 ("Having to monitor any offensive behavior occurring after an employee engages in protected expression is particularly troublesome for the blue-collar employer, whose workplace is permeated with vulgar expression. Under the HWE standard, a blue-collar employer may not be able to use the nature of its work environment to prove that offensive expression

Many of Gamer's arguments extend beyond HWE law's application to the anti-retaliation provision. Her arguments tend to parallel those of Justice Alito's: the new standard is unclear and will be difficult to apply by the lower courts. However, others have argued that the *Burlington* standard is clear.

D. Arguments That the Burlington *Standard Is Actually Clear*

Two commentators, Gary Friedman and Jonathan Shiffman, question the complaints of those who contend that *Burlington* "broadens the scope of Title VII retaliation cases."[145] They contend that language in *Burlington* exemplifies the Court's intent on creating clarity "by steering clear of subjective considerations and applying an objective standard designed to weed out flimsy retaliations claims."[146] Freidman and Shiffman argue that the careful analysis of the Court's decision makes concerns raised about the clarity of the *Burlington* standard erroneous.[147]

Freidman and Shiffman argue that *Burlington* "makes it clear that there are certain types of employer actions that simply will not qualify as grounds for a retaliation claim."[148] They state that the Court in *Burlington* made it clear to the lower courts to use their powers to ensure that such claims do not reach a jury.[149] First, Freidman and Shiffman focus on the Court's intent to create a clear standard, relying on the Court expressing its interest in creating a "judicially administrable" standard.[150] Using such a standard is important "in order for judges to avoid 'uncertainties' in determining what types of actions qualify as retaliatory."[151]

Next, Freidman and Shiffman contend that the Court's insertion of a "reasonable employee" test creates clarity:

> One element of this clear standard is the Court's enunciation of the "reasonable employee" test. The Court states that in determining whether an action is retaliatory, trial courts should look to whether a reasonable employee, standing in the shoes of the plaintiff, would be dissuaded from making or supporting a charge of discrimination. This "objective" standard, which has been applied by federal courts in discrimination cases in other contexts, assures that a plaintiff cannot prevail by relying on "subjective feelings" or "personal reactions."

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following protected activity was typical rather than retaliatory." (footnote omitted)).

145. Gary D. Friedman & Jonathan A. Shiffman, Burlington*: Setting Standard to Cut Out Weak Retaliation Claims*, N.Y.L.J. 4, Aug. 4, 2006, at 4.

146. *Id.*

147. *Id.* ("Specifically, the Court stated that it expects this objective standard to be rigorously administered by the lower courts and implicitly concluded that claims which do not meet this standard should be dismissed at summary judgment.").

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

"[H]ypersensitive" employees are not entitled to "more protection than a reasonable employee."[152]

Having such an "objective" standard saves employers from liability for frivolous claims.[153] According to Freidman and Shiffman, this standard will be particularly important at summary judgment.[154] An employee cannot survive summary judgment by simply testifying that the employer's actions would have personally dissuaded the employee from filing a charge had she known that the employer would retaliate.[155] Rather, employers can attach onto an employee's peculiar hypersensitivity and argue that a reasonable employee would not have been dissuaded.[156] In that case, the employer wins at summary judgment.[157] Further, Friedman and Shiffman note that a substantial number of retaliation claims spring from a reassignment of duties, and that the Court's statements that "a 'reassignment of job duties is not automatically actionable'" will be valuable at the summary judgment stage.[158] Friedman and Shiffman also state that the Court's "materially adverse" standard will be a useful tool for employers at the summary judgment stage in litigation.[159] The Court stated that the anti-retaliation "provision covers 'only those' . . . actions that are materially adverse."[160]

Nonetheless, one would logically assume litigation to rise given the Court's broad interpretation of Title VII's anti-retaliation provision. All of the circuits must now apply a reasonable employee standard as opposed to a more objective and straightforward ultimate employment decision test. Summary judgment will necessarily become harder to obtain by employers. Before *Burlington*, employers in ultimate employment decision circuits just needed to show that the employer did not fire the employee (or make any other ultimate employment decision). Now, an employer who changes an employee's job may be liable depending on the factual "context" of the change. Although the Court purported to avoid frivolous claims by creating an "objective" standard that requires "material adversity," the Court, as pointed out by Justice Alito, opened the door for employee advocates to survive summary judgment by stating that "context matters." [161] This language allows employees to rely on their particular facts instead of a reasonable person's status. Admittedly, the Court noted that a change in work hours could be materially adverse to one employee, but not the

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152. *Id.* (footnote omitted).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2417 (2006)).

159. *Id.*

160. *Id.* ("It is essential, the Court stated, to 'separate significant from trivial harms,' because 'petty slights, minor annoyances, and simple lack of good manners are not enough.'" (quoting *Burlington*, 126 S. Ct. at 2415)).

161. *Burlington*, 126 S. Ct. at 2415-16.

next.[162]

However, the Court's decision will not make it "virtually impossible for employers to prevent liability."[163] Although employers may face more retaliation claims and more trials as a result, they could avoid liability by putting in effective anti-retaliation policies and grievance procedures. Further, the Court did specifically state that "petty slights" would not suffice for a valid retaliation claim.[164]

Ultimately, employers need to address their internal policies and grievance procedures for retaliation. Given the potential expansiveness of the *Burlington* standard, the lower courts should allow an employer to assert an affirmative defense when it has implemented adequate and effective anti-retaliation policies and grievance procedures, and the employee has failed to utilize those procedures.

V. WHY COURTS SHOULD ALLOW EMPLOYERS TO MAKE AFFIRMATIVE DEFENSES TO RETALIATION CLAIMS BASED UPON ADEQUATE HUMAN RESOURCE POLICIES AND WHAT EMPLOYERS CAN DO TO LIMIT LIABILITY

In the sexual harassment context under Title VII's main discrimination provision, employers may assert an affirmative defense against hostile work environment claims. The Supreme Court's reasoning in allowing that affirmative defense also justifies allowing a similar defense to a retaliation claim based upon non-tangible employment action. Further, regardless of the availability of such an affirmative defense, employers must implement effective HR policies against retaliation to curtail the potential liability under the *Burlington* standard.

A. Allowing Employer's an Affirmative Defense in Title VII Retaliation Claims

1. Ellerth *and* Faragher*: The Court Creates an Affirmative Defense Against Hostile Work Environment Claims.*—Under Title VII's main provision,[165] an employee can assert a claim of discrimination against an employer based on sexual harassment.[166] Two types of sexual harassment claims exist under Title VII: (1) "quid pro quo" harassment and (2) hostile environment.[167] Quid pro quo harassment occurs when an employer conditions an employee's potential "employment benefits upon unwelcome sexual conduct."[168] On the other hand, hostile work environment "means a work environment that is hostile or abusive

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162. *Id.* at 2415 ("A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." (citing Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005))).

163. Gamer, *supra* note 6, at 295.

164. *Burlington*, 126 S. Ct. at 2415.

165. 42 U.S.C. § 2000e-2(a) (2000).

166. *See generally* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.14 (3d ed. 2004).

167. *Id.* at 239.

168. *Id.*

because of severe and pervasive harassment based upon gender."[169]

The Supreme Court considered the degree of employer liability for sexual harassment under Title VII in *Burlington Industries, Inc. v. Ellerth*[170]and *Faragher v. City of Boca Raton.*[171] In these cases, the Court distinguished between the two types of sexual harassment claims.[172] Prior to *Ellerth* decision, lower courts held employers vicariously liable for harassment identified as quid pro quo.[173] However, the Supreme Court in *Ellerth* did not limit an employer's vicarious liability to harassment identified as quid pro quo. Instead, the Court held that employers are liable for harassment involving a "tangible employment action."[174] "Tangible employment action" means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[175] When harassment by a supervisor leads to a tangible employment action, the employer is strictly liable.[176]

For harassment that does not lead to a tangible employment action, including hostile work environment claims, the employer is strictly liable unless it satisfies the affirmative defense standard articulated in *Ellerth.*[177]

> When [the harassment complained of] is a hostile work environment created by the supervisor, the employer is liable unless it can show as an affirmative defense that (1) it exercised reasonable care to prevent and promptly correct the harassment and (2) that the employee unreasonably failed to use the employer's remedial procedures.[178]

Therefore, employers can elude liability under Title VII for a hostile work environment claim by exercising reasonable care in creating policies to prevent such harassment, swiftly remedying such harassment when it happens, and showing that the employee failed to use the procedures set forth in the employer's policies.

By creating this affirmative defense, the Court desired to effectuate congressional intent as well as EEOC policy. Specifically, the Court noted Title VII's purpose of encouraging employers to create anti-harassment policies and

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169. *Id.*

170. 524 U.S. 742 (1998).

171. 524 U.S. 775 (1998).

172. *Ellerth*, 524 U.S. at 752; *Faragher*, 524 U.S. at 787-92; *see* ROTHSTEIN ET AL., *supra* note 166, at 249-50; *see also* Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 203-06 (2004) (discussing the Court's analysis in *Ellerth* and *Faragher*).

173. *See* Lawton, *supra* note 172, at 204-05.

174. *Ellerth*, 524 U.S. at 753; *see* Lawton, *supra* note 172, at 203-06.

175. *Ellerth*, 524 U.S. at 761; *see* Lawton, *supra* note 172, at 204.

176. *Ellerth*, 524 U.S. at 762; *see* Lawton, *supra* note 172, at 204.

177. *Ellerth*, 524 U.S. at 765; *see* Lawton, *supra* note 172, at 204-05.

178. ROTHSTEIN ET AL., *supra* note 166, at 250.

effective grievance procedures.[179] The Court reasoned that, in judging an employer's liability based upon an employer's effort to create effective policies and procedures, the affirmative defense would effectuate "Congress'[s] intention to promote conciliation rather than litigation in the Title VII context."[180] The Court also concluded that the affirmative defense system would effectuate the EEOC's policy of encouraging employers to create grievance procedures.[181] Moreover, "[t]o the extent limiting employer liability [encourages] employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."[182] In short, allowing the affirmative defense forces employers to either implement effective anti-harassment policies and grievance procedures or face liability under Title VII. The implementation of these policies and grievance procedures would result in more protection of employees against harassment and less litigation for employers.

The Court put this affirmative defense in context in *Faragher*. *Faragher* involved a claim brought by a female lifeguard alleging that her supervisors had harassed her.[183] She worked summers as a lifeguard for Boca Raton's Parks and Recreation Department.[184] She never reported her claim to the higher management.[185] The City first heard of the supervisors' conduct through a separate complaint filed by a former lifeguard.[186] The Court found that the harassment did involve a tangible employment action and, therefore, applied the affirmative defense test.[187]

Instead of remanding the case to the district court to allow the City to present evidence on the affirmative defense, the Court held that the City could not satisfy the test regardless of evidence it would try to produce because the City could not satisfy the first prong of the affirmative defense.[188] First, "the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and . . . made no attempt to keep track of the conduct of supervisors."[189] Second, the employer's policy in essence required employees to confront the harassing supervisor in order to file a complaint by not providing an employee with a means to bypass the supervisor.[190] These two factors led the Court to conclude "that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct."[191] Therefore, the affirmative

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179. *Ellerth*, 524 U.S. at 764.
180. *Id.* (citing EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984)).
181. *Id.* (citing 29 C.F.R. § 1604.11(f) (1997)).
182. *Id.* (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995)).
183. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).
184. *Id.*
185. *Id.* at 782.
186. *Id.* at 782-83.
187. *Id.* at 808.
188. *Id.* at 808-09.
189. *Id.* at 808.
190. *Id.*
191. *Id.*

defense failed.

In short, the Supreme Court gave employees more protection against harassment involving a tangible employment action than a hostile work environment claim. Employers could now assert an affirmative defense to harassment not involving, among other things, hiring, firing, failure to promote, and a change in benefits. The Supreme Court in *Burlington* did, however, consider and ultimately reject the distinction between tangible and non-tangible employment actions in defining actions that "discriminate against" employees who have engaged in a protected activity under Title VII's anti-retaliation provision.[192]

2. The Court's Analysis of Ellerth *in* Burlington.—One does not need to be a Supreme Court Justice to notice the Court's differing approaches to non-tangible employment actions in *Ellerth* and *Burlington*. In *Ellerth*, the Court essentially protected employers from liability by allowing them to assert an affirmative defense that they made reasonable efforts to prevent harassment and that the employee did not take advantage of procedures in place.[193] However, in *Burlington*, the Court held that employers are liable for retaliatory conduct including non-tangible employment action if such conduct would deter a reasonable employee from filing a claim under Title VII.[194]

Nonetheless, the Court did not use the language from *Ellerth*. The Court stated that *Ellerth* used the tangible employment action language only to "'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors."[195] Further, "*Ellerth* did not mention Title VII's anti-retaliation provision at all."[196]

It is not entirely clear, however, whether courts could allow an employer to make an affirmative defense to a Title VII retaliation claim. On first sight, the absence of any discussion regarding an affirmative defense in the *Burlington* decision cuts against the likelihood that the Court would accept such a defense to a retaliation claim. It seems that the Court could have easily made such a decision. For example, the Court could have articulated a standard similar to the standard articulated in *Ellerth*: for non-tangible employment actions that would deter a reasonable person from filing a claim or charge under Title VII, an employer is liable subject to an affirmative defense.[197] Under the affirmative defense, the employer must show that (1) it exercised reasonable care to prevent and promptly correct the retaliatory conduct and (2) that the employee unreasonably failed to use the employer's remedial procedures.[198] For tangible

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192. 42 U.S.C. § 2000e-(3)(a) (2000); Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2413 (2006).

193. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

194. *Burlington*, 126 S. Ct. at 2415.

195. *Id.* at 2413 (quoting *Ellerth*, 524 U.S. at 760) (alteration in original).

196. *Id.*

197. *Ellerth*, 524 U.S. at 765.

198. *Id.*

employment actions, the affirmative defense option disappears.[199] The Court, however, did not enunciate such a rule in *Burlington* even though, arguably, it could have.

However, the parties, and the Court for that matter, were focused on defining retaliatory actions that "discriminate against" an employee under Title VII. The issue did not involve possible defenses to a retaliation claim; it involved defining the proper scope of liability under Title VII's anti-retaliation provision. Further, Justice Breyer, the author the *Burlington* decision, reminded the lower courts and the parties of the importance of "*material* adversity."[200] He stated:

> We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.[201]

Certainly, Justice Breyer was trying to alleviate some of Justice Alito's concerns voiced in his concurring opinion. In supporting this assertion that insignificant claims, presumably stemming from non-tangible employment actions, should be dismissed, Justice Breyer cites *Faragher v. City of Boca Raton*.[202] Arguably, claims without material adversity would be dismissed under the affirmative defense applied in *Faragher*.[203] Further, just as the Court could have easily articulated an affirmative defense to retaliation claims in its opinion, it could just as easily expressly held that employers could not assert an affirmative defense.

Nonetheless, the language in the opinion, and the Court's differing treatment of non-tangible employment actions, suggest the Court's unwillingness to allow for an affirmative defense. However, employers and their attorneys would be wise to argue for such an affirmative defense. Further, the lower courts, given the potential liability for employers under the reasonableness standard articulated in *Burlington*, should allow for the defense.

3. An Argument for Allowing an Affirmative Defense Against Title VII Anti-Retaliation Claims.—After *Burlington*, employers will be fighting an uphill battle at the summary judgment stage of litigation. Before the *Burlington* decision, employers defending against a retaliation claim in circuits utilizing the "ultimate employment decision" standard or those circuits requiring tangible employment actions could succeed at the summary judgment stage by simply showing that the supervisor's actions did not involve "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change

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199. *Id.*

200. *Burlington*, 126 S. Ct. at 2415.

201. *Id.* (citations omitted).

202. *Id.* (citing Faragher v. City of Boca Raton, 524 U.S. 775 (1998)).

203. *See Faragher*, 524 U.S. at 808-09.

in benefits."[204] After *Burlington*, for claims alleging non-tangible employment action, an employer's fate at the summary judgment stage will be difficult if not impossible to predict. District judges' interpretations of which non-tangible employment action would dissuade a reasonable employee from asserting a claim under Title VII will arguably differ to a large degree, such that different plaintiffs with identical facts will achieve opposite results. As previously discussed, the difficulty in predicting liability for retaliatory conduct has employers concerned. Given the potential for liability under the anti-retaliation provision, employers should assert an affirmative defense, virtually identical to an *Ellerth* affirmative defense, to an employee's retaliation claim. Furthermore, the lower courts should recognize such an affirmative defense.

The reasoning used by the Court in explaining its introduction of an affirmative defense for hostile work environment claims in *Ellerth* and *Faragher* also justifies the use of an affirmative defense for Title VII retaliation claims.[205] By allowing for an affirmative defense to an anti-retaliation claim, employers will be charged with taking action to avoid supervisors' retaliatory conduct against employees who have engaged in a protected activity. In turn, employees will ideally be more protected from retaliation, without having to resort to litigation, and under the Court's reasoning in *Burlington*, will be more likely to make claims under the main discrimination provision of Title VII. As in *Ellerth*, by judging an employer's liability for its supervisors' retaliatory conduct based upon an employer's effort to create effective policies and grievance procedures, the affirmative defense against a retaliation claim would effectuate "Congress'[s] intention to promote conciliation rather than litigation in the Title VII context."[206]

An affirmative defense system would force employers to either implement effective anti-retaliation policies and grievance procedures or face liability under Title VII. Ultimately, the implementation of these policies and grievance procedures would result in more protection of employees against harassment and potentially less litigation for employers.

However, at least one commentator argues that the policy reasons discussed by the Court in *Ellerth* have not in practice come to fruition.[207] In reality, lower courts just require an employer to show a policy and grievance procedure and do not actually litigate the reasonableness of the procedures.[208] Thus, employees are not further protected after *Ellerth* because employers do not actually do anything to prevent or correct sexual harassment.[209] Simply having a policy, it is argued, is good enough to obtain summary judgment.[210] The lower courts apply the test broadly such that employer's avoid liability without effectuating the Court's stated reasons for creating the affirmative defense, namely prevention of

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204. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

205. *Id.* at 764 (citing EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984)).

206. *Id.* (citing *EEOC*, 466 U.S. at 77).

207. Lawton, *supra* note 172, at 212-15.

208. *Id.*

209. *Id.*

210. *Id.*

workplace harassment.[211] Instead, employers survive liability simply for "file cabinet compliance."[212] Under the current system, "[t]here is little incentive for an employer to keep records of harassment complaints, to implement post-complaint follow-up procedures, to periodically assess and revise the firm's anti-harassment policies and procedures, or to evaluate supervisory personnel on their compliance with and implementation of the employer's policies and procedures."[213]

This is where the Court's distinguishing between Title VII's main discrimination provision and retaliation provision aids employers. The Court clearly broadened the standard under the anti-retaliation provision more than that of the main discrimination provision. It gave it a broader reading and thus gave employees more protection under the retaliation provision than under the main discrimination provision. It follows that, given the broader protection under the anti-retaliation provision, employers should therefore be required to prove more for the affirmative defense, particularly in the first part: showing a reasonable policy against retaliation and grievance procedures for employees who are retaliated against. Courts should then require more than just a showing of an existing policy and grievance procedures. The employers should show how the process works currently, how it has worked in the past, and how often the policy and procedures are implemented and explained to supervisors and employees alike. By forcing this extra hurdle as compared to typical *Ellerth* affirmative defenses, employers will actually have to follow through with their policies (and will have to show to the court that they indeed do follow through), and thus employees will actually benefit from the policies, unlike under *Ellerth*. A more demanding affirmative defense will protect more employees than does the *Ellerth* affirmative defense. It will also give employers the opportunity to avoid liability by explicitly showing it made affirmative efforts to prevent future and remedy existing retaliation against employees engaging in a protected activity.

4. Employers Need to Implement Effective Anti-Retaliation Policies and Grievance Procedures Regardless of the Availability of an Affirmative Defense.—Although allowing employers to assert an affirmative defense to Title VII retaliation claims would be a large step in the direction of avoiding liability, employers should effectuate policies and grievance procedures regardless of the availability of an affirmative defense. These policies would decrease liability by preventing retaliation by supervisors against employees who have engaged in a protected activity. Almost immediately following the *Burlington* decision, employer advocates flooded legal periodicals with HR advice to avoid liability under the new broad standard for defining actions that discriminate against employees.[214] This advice is outlined below.

After the Court's decision in *Burlington*, employers absolutely must

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211. *Id.*

212. *Id.* at 212-15, 260-61.

213. *Id.*

214. Burlington N. & Sante Fe Ry. Co. v. White, 126 S. Ct. 2405, 2413 (2006) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998)).

implement a specific anti-retaliation policy. Preventing liability for Title VII retaliation claims starts with an effective policy against employer retaliation. The company must take a firm stance against retaliatory conduct.[215] The company must distribute the policy to supervisors and employees alike.[216] The company must stress that retaliating against an employee for engaging in a protected activity (i.e., filing a complaint with the EEOC for discrimination) is not only illegal, but also strictly against company policy.[217] This anti-retaliation policy should be inserted into the employee handbook.[218] Employers might require signed receipts from each employee acknowledging they have read and understood the company's policy against retaliatory conduct.[219]

Employers must also have effective grievance procedures. These procedures must specifically lay out a process in which an aggrieved employee can file a complaint against a supervisor or colleague.[220] Employers should maintain a policy of promptly investigating and resolving such complaints.[221] Employers should also assure complainants that the complaints and facts asserted therein will remain confidential, as long as practicable "given the need to investigate and resolve issues."[222] The grievance procedures must effectively separate alleged victims from alleged harassers.[223] The ability of an alleged victim of sexual harassment to bypass the harassing supervisor was critical in the Court's affirmative defense analysis in *Faragher*.[224] If employers argue for an affirmative defense, they must make sure that the grievance procedure for employees who have allegedly been retaliated against allow the employee to bypass the supervisor who allegedly retaliated against that employee. After an employee files a complaint, and through the duration of the investigation incident to such complaint, employers should make available HR personnel to the employee to ensure a smooth day-to-day working environment.[225]

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215. *See* Allan H. Weitzman & Heather G. Magier, *The Dark Clouds of* Burlington Northern*: Is There a Silver Lining?*, HR ADVISOR: LEGAL & PRAC. GUIDANCE, Sept.-Oct. 2006, at 2 (listing the top five tips for employers in dealing with retaliation situations). These tips include having an anti-retaliation provision, maintaining restraint from "responding emotionally" after being accused of discrimination, keeping "written and verbal statements in check," receiving a second opinion before taking adverse action against an employee, and working hand-in-hand with HR professionals when addressing employee complaints. *Id.*

216. *See id.*

217. *See id.*

218. *See* Louis R. Lessig, Commentary, *Why Employers Must Pay Close Attention to Title VII Retaliation Claims*, ANDREWS EMP. LITIG. REP., Aug. 1, 2006, at 13 (discussing steps employers should take to prevent liability under the new Title VII anti-retaliation standard).

219. *See id.*

220. *See* Janove, *supra* note 110.

221. *See id.*

222. *See id.*

223. *See* Lessig, *supra* note 218.

224. Faragher v. City of Boca Raton, 524 U.S. 775, 808-09 (1998).

225. *See* Janove, *supra* note 110.

Employers must take action to train supervisors and employees regarding the new anti-retaliation standard. Supervisors need to realize that their actions will be more heavily scrutinized, that employees have more protection now than before, and that some actions that would not normally be thought of as retaliatory conduct may be found by a court to be just that. Employees, of course, need to be notified of their rights. Full disclosure of the rights of employees and responsibilities of supervisors should ultimately lead to less retaliation litigation. Proper training would include hypothetical situations to illustrate to supervisors what constitutes and what does not constitute retaliatory conduct.[226] The EEOC provides the following three examples in its compliance manual that employers might choose to use:

> Example 1—[An employee] filed a charge alleging that he was racially harassed by his supervisor and co-workers. After learning about the charge, [the employee's] manager asked two employees to keep [the employee] under surveillance and report back about his activities. The surveillance constitutes an "adverse action" that is likely to deter protected activity, and is unlawful if it was conducted because of [the employee's] protected activity.
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> Example 2—[An employee] filed a charge alleging that she was denied a promotion because of her gender. One week later, her supervisor invited a few employees out to lunch. [The employee] believed that the reason he excluded her was because of her EEOC charge. Even if the supervisor chose not to invite [the employee] because of her charge, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity.
>
> Example 3—Same as Example 2, except that [the employee's] supervisor invites all employees in [the employee's] unit to regular weekly lunches. The supervisor excluded [the employee] from these lunches after she filed the sex discrimination charge. If [the employee] was excluded because of her charge, this would constitute unlawful retaliation since it could reasonably deter [the employee] or others from engaging in protected activity.[227]

The lunch hypothetical from examples two and three draws from Justice Breyer's opinion in *Burlington*.[228] The training should include HR personnel as well as equal employment opportunity officers.[229] Furthermore, employers should train recruiters and interviewers as well because Title VII protection extends to job applicants as well as existing employees.[230]

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226. *See id.*

227. *See* EEOC COMPLIANCE MANUAL, *supra* note 122.

228. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415-16 (2006).

229. *See* Lessig, *supra* note 218.

230. *See* 42 U.S.C. § 2000e-3(a) (2000) (providing that "[i]t shall be an unlawful employment

Proper documentation will prove critical in defending against retaliation claims.[231] After *Burlington*, employees must still prove the causal connection between the protected activity and the alleged retaliatory conduct.[232] Proper documentation allows an employer to show a court the valid, non-discriminatory (i.e. non-retaliatory) reasons for taking actions against an employee.[233] However, an employer should hesitate when considering whether to create a written file in response to an employee's complaint.[234] Employers could also consider requiring job applicants and existing employees to arbitrate claims relating to employment.[235]

It is also advisable for an employer to consider creating an independent office, separate from HR offices, as a safe house for employees to seek advice after being retaliated against.[236] This office could provide employees with an informal and confidential resource to raise issues and concerns.[237] Such offices could avoid litigation for the employer by offering a place for employees to seek redress for retaliation against them before filing an EEOC complaint.[238] The office personnel, being trained on the applicable law and options for the employee, including available grievance procedures in both the EEOC and the company itself, can give the employee a full picture of the options available to him or her.[239] Given all of the options, employees might not choose to make a federal case out of their situation.[240]

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practice for an employer to discriminate against any of his employees or *applicants for employment* . . . .") (emphasis added).

231. *See* Wetchler, *supra* note 109.

232. *See* Courts, *supra* note 15, at 240.

233. *See* Lessig, *supra* note 218. Lessig, by way of example, states "if there are issues with an employee's performance that go undocumented and then a retaliation claim is brought by this individual over a job transfer that was purely performance-based, the employee could have a valid claim." *Id.*

234. *See* Weitzman & Magier, *supra* note 215 ("While documentation is a good idea and can prevent future disputes over who said what, a file should not be built as a response to the employee's complaint. Supervisors must treat all employees in a consistent manner."); *see also* Maslanka, *supra* note 110 ("[I]t is imperative that managers understand that they keep the filing of a claim of discrimination separate from any memo on performance. Never mention the filing of a charge with the EEOC . . . in a memo regarding employee performance. . . . It doesn't belong there.").

235. *See* Wetchler, *supra* note 109.

236. *See* Michael Eisner, *Creation of an Ombuds Office Can Prevent Retaliation Claims*, MEDIATE.COM, Jan. 2007, http://www.mediate.com/articles/eisnerM1.cfm (discussing the use of "Ombuds" offices to prevent retaliation claims).

237. *Id.*

238. *See id.*

239. *Id.*

240. *Id.* ("[M]any people who believe they are victims of harassment or discrimination simply want the behavior to stop. . . . [F]iling a formal complaint is not always the best way to accomplish that goal.").

CONCLUSION

Last year, the United States Supreme Court broadened the scope of actionable conduct under Title VII's anti-retaliation provision. Prior to the decision, employees in some circuits could only recover under the anti-retaliation provisions for suffering an ultimate employment decision, such as being fired, or employment actions affecting the employees terms and conditions of employment. After the Court's decision, employees can recover under Title VII's anti-retaliation provision for any employment action that would deter a reasonable employee from engaging in a protected activity. In effect, the Court opened the door to recover for non-tangible employment actions. For example, purposely not inviting an employee to a lunch training session could constitute actionable retaliatory conduct if the lunch would contribute significantly to the employee's professional development and advancement. The Court's standard encourages a case-by-case approach for determining what employer actions constitute actionable wrongs under Title VII. Context matters according to the Court, and therefore, more anti-retaliation claims will be decided by juries instead of judges on summary judgment motions.

In the sexual harassment context, the Supreme Court has allowed employers to assert an affirmative defense to non-tangible sexual harassment claims. If the employer can prove it maintains an efficient and reasonable policy against sexual harassment that includes adequate grievance procedures, the employer is not vicariously liable for a supervisor's harassing behavior. The same affirmative defense system should apply to Title VII anti-retaliation claims stemming from alleged non-tangible employment actions. By having an affirmative defense available, employers will be required to create effective policies and grievance procedures to prevent retaliation in the workplace. These policies and procedures, supplemented by proper training, will deter retaliatory conduct in the workplace.

The broadened scope of actionable conduct under Title VII's anti-retaliation provision should concern employers. Having fewer claims decided by summary judgment equates to increased costs from more litigation. Therefore, regardless of the availability of an affirmative defense, employers should immediately implement anti-retaliation policies and grievance procedures. These policies should be distributed and explained to every employee and supervisor. Ultimately, with an effective system in place, employers will hopefully deter most retaliation in the workplace while avoiding the increased costs involved with litigating Title VII anti-retaliation claims.